CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 100

BERTRAM WILLIAMS, MAX BRASCH AND HEINZ MOTTEK, SUING ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS OF CLASS B DEBENTURES OF GREEN BAY AND WESTERN RAILROAD COMPANY, PETITIONERS,

vs.

GREEN BAY AND WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 100

BERTRAM WILLIAMS, MAX BRASCH AND HEINZ MOTTEK, SUING ON BEHALF OF THEMSELVES AND ALL OTHER HOLDERS OF CLASS B DEBENTURES OF GREEN BAY AND WESTERN RAILROAD COMPANY, PETITIONER,

vs.

GREEN BAY AND WESTERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1945.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

(Civil Action No. 26-194)

STATEMENT PURSUANT TO RULE 13

This is an action brought by plaintiffs as holders of Class B debentures issued by defendant, Green Bay and Western Railroad Company, on behalf of themselves and all other holders of such debentures, to recover amounts payable under such debentures out of earnings in lieu of interest.

The action was instituted in the New York Supreme Court, New York County, on April 26, 1944, by service of a copy of the summons and complaint on the defendant in the City of New York. On petition of defendant alleging diversity of citizenship and that the amount in controversy exceeds $3,000, the action was removed to the United States District Court for the Southern District of New York on [fol. 2] June 15, 1944. The defendant appeared specially and moved, by notice of motion dated and served June 19th, 1944, to dismiss the complaint for lack of jurisdiction over the person on the ground that the defendant, a Wisconsin corporation, was not doing business within the State of New York. By stipulation dated July 18, 1944, the defendant amended its notice of motion to include a motion to dismiss the complaint for lack of jurisdiction of the subject matter of the action on the ground that the subject matter was concerned with the internal affairs of a foreign corporation.

The said motions came on regularly to be heard at a term of the United States District Court for the Southern District of New York, held on July 18, 1944, before Judge Francis G. Caffey.

In an opinion dated August 1, 1944, Judge Caffey held that the defendant was doing business within the State of New York and accordingly denied the motion to dismiss the complaint on the ground of lack of jurisdiction over the person. The motion to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter of the action in that it was concerned with the internal affairs of a foreign corporation was granted.

On August 9, 1944, an order and judgment was entered dismissing the complaint.

On September 1, 1944, the notice of appeal was filed with the Clerk of the United States District Court for the Southern District of New York.

The names of the parties are as set forth above, no changes having taken place.

There has been no arrest, bail or attachment, and no question was ever referred to a commissioner or commissioners, master or referee.

[fol. 3] IN SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant

COMPLAINT

Plaintiffs bring this action on behalf of themselves and of all other holders of Class B Debentures of defendant Green Bay and Western Railroad Company who may elect to join in the prosecution of this action and contribute to the expense thereof, and allege:

1. The question which is the subject of this action is one of common and general interest to all holders of Class B Debentures of the defendant, Green Bay and Western Railroad Company.

2. Plaintiff Bertram Williams is the owner and holder of $20,000 face amount of Class B Debentures of the defendant, consisting of 20 certificates of the face value of

$1,000 each and bearing serial numbers 84, 546, 598, 612, 613, 621, 643, 1253, 1266, 2320, 2570, 2733, 2816, 3661, 4798, 4889, 4934, 5042, 5863 and 6392, respectively.

3. Plaintiff Max Brasch is the owner and holder of $30,000 face amount of Class B Debentures of the defendant, consisting of 30 certificates of the face value of $1,000 each and bearing serial numbers 45, 133, 154, 673, 777, 901, 998, [fol. 4] 1677, 1702, 1801, 1802, 1803, 1804, 1856, 1992, 2087, 2383, 2384, 2628, 2629, 2630, 2963, 3359, 3362, 3364, 4369, 5892, 5923, 6713 and 6919, respectively.

4. Plaintiff Heinz Mottek is the owner and holder of $24,000 face amount of Class B Debentures of the defendant, consisting of 24 certificates of the face value of $1,000 each and bearing serial numbers 1069, 1094, 1095, 1096, 1097, 1100, 1103, 1104, 1106, 1107, 2080, 2208, 2224, 5108, 6010, 6041, 6441, 6694, 6718, 6720, 6730, 6735, 6800 and 6875, respectively.

5. Defendant is a foreign corporation organized and existing under the laws of the State of Wisconsin, and maintains an office for the transaction of business within the City and State of New York.

6. The Articles of Incorporation of the defendant authorized it to issue Class B Debentures in the face amount of $7,000,000, pursuant to the following provision thereof:

> "Seven Million Dollars face value of instruments to be issued by said new company to be known as Class B Debentures, which debentures shall be issued in amounts of One Thousand Dollars each and shall be payable only in the event of a sale or reorganization of the railroad and property of said company and then only out of any net proceeds of such sale or reorganization which may remain after payment of all liens and charges upon said railroad or property, and after payment of Six hundred Thousand Dollars to the holders of said Class A Debentures and Two million five hundred Thousand Dollars to the stockholders, any such net proceeds remaining after such payments to be distributed pro rata to and among the holders of the said Class B Debentures, the holders thereof to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year re-

maining after payment of five per cent upon the said Class A Debentures and the said stock. Such surplus [fol. 5] net earnings, if any, to be paid to and distributed among the holders of Class B Debentures pro rata and the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

7. Pursuant to said provision of its said Articles of Incorporation, the defendant issued under its corporate seal as of July 1, 1896 seven thousand of its Class B Debentures in the face amount of $1,000 each, said debentures being in the form annexed hereto as Exhibit "A".

8. In addition to the Class B Debentures, the defendant was authorized by its Articles of Incorporation to issue and did issue capital stock of an aggregate par value of $2,500,000, and Class A Debentures in the face amount of $600,000.

9. In and by its Articles of Incorporation and the debentures issued thereunder, the defendant contracted and agreed to pay to and distribute pro rata among the holders of its Class B Debentures, in lieu of interest, any net earnings of the defendant remaining in each year after payment of 5% on the par value of its capital stock and 5% on the face value of its Class A Debentures. The amount required annually for such preferential payments to the holders of defendant's capital stock and Class A Debentures aggregated $155,000.

10. In each of the years commencing with 1924 to and including 1943, with the exception of the years 1932, 1933 and 1934, the defendant had substantial net earnings in excess of the $155,000 required to be paid to the holders of its capital stock and Class A Debentures. The aggregate amount of such net earnings, after deducting reserves for additions, general improvements and depreciation, and after deducting said sum of $155,000 in each of said years, was $1,649,618.85. The amount of such net earnings of defendant in each of said years, the amount distributed in each of said years to the holders of defendant's capital stock and Class A Debentures, and the amount of net earn- [fol. 6] ings remaining in each of said years for distribution to the holders of Class B Debentures is shown in Exhibit "B" annexed hereto.

11. The defendant paid to the holders of its Class B Debentures from its net earnings for the years 1924 to 1943, with the exception of the years 1932, 1933 and 1934, sums aggregating $840,000. Exhibit "C" annexed hereto shows the amounts paid to the holders of Class B Debentures in each of said years.

12. The defendant failed and neglected to pay to or distribute among the holders of Class B Debentures its remaining net earnings in the aggregate sum of $809,618.85, and instead and contrary to its agreement with the holders of its Class B Debentures retained said earnings and carried the same to and accumulated them in its surplus account. The amount of such earnings so improperly retained and carried to and accumulated in its surplus account for each of the years 1924 to 1943, with the exception of the years 1932, 1933, and 1934, is shown on Exhibit "C" hereto annexed under the heading "Net Earnings Withheld".

13. The surplus of the defendant in each of the years aforementioned was in excess of the defendant's annual net earnings, and the payment of said annual net earnings to the holders of the Class B Debentures would not at any time have created a deficit.

14. Said sum of $809,618.85 is now carried by the defendant in its surplus account and represents the amount from net earnings of the defendant which the holders of the Class B Debentures are entitled to receive in lieu of interest under their contract with the defendant. Said sum is justly due and owing to the said holders and should be distributed among said holders pro rata.

15. Defendant has failed to pay any part of said sum and has taken no action looking towards the payment thereof to the holders of its Class B Debentures, but on the contrary [fol. 7] continues to carry said sum in its surplus account and wrongfully withholds the same from the holders of its Class B Debentures, and there is danger that said sum now credited to the surplus account of defendant may be appropriated to other purposes and uses of the corporation and thereby dissipated and made unavailable for payment of the sums due and owing by the defendant on its Class B Debentures.

16. That the plaintiffs have no adequate remedy at law.

Wherefore, plaintiffs demand judgment:

(1) That the rights of plaintiffs and of all other holders of Class B Debentures in and to the net earnings of the defendant be determined;

(2) That this Court decree that the holders of Class B Debentures of defendant are entitled to receive pro rata the sum of $809,618.85, with appropriate interest, as their share of the annual net earnings of defendant for the years 1924 to 1943, inclusive, in lieu of interest on said debentures;

(3) That this Court direct the defendant to pay and distribute such sum among the holders of its Class B Debentures pro rata;

(4) That the plaintiffs be awarded out of any recovery herein the expenses, costs and disbursements incident to the prosecution of this action, including reasonable counsel and accounting fees to their attorneys and accountants herein;

(5) And that the plaintiffs have such other and further relief as may be just and proper.

Unger & Pollack, Attorneys for Plaintiffs, Office & P. O. Address, 111 Broadway, Borough of Manhattan, New York, N. Y.

(Verified by all three plaintiffs.)

[fol. 8] EXHIBIT "A"

(Attached to Complaint)

UNITED STATES OF AMERICA

GREEN BAY AND WESTERN RAILROAD COMPANY

STATE OF WISCONSIN

$1,000 Class B. Debenture No. —

The Green Bay & Western Railroad Company hereby certifies that this is one of a series of Seven thousand of its Class B Debentures in the sum of One Thousand Dollars each, aggregating in all the sum of Seven Million Dollars, which sum of One Thousand Dollars will be payable to the bearer hereof, or if registered, to the person appearing on the books of the said Company as the last registered owner

hereof, only in the event of a sale or reorganization of the Railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges upon such railroad or property, and after payment of Six hundred thousand Dollars to the holders of a series of debentures known as Class A, issued or to be issued by said Company, and the sum of Two Million, five hundred thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures. The said Railroad Company Hereby Covenants and Agrees that no mortgage shall at any time be placed upon its railroad and other property, nor shall the same be leased or sold without the consent of the holders of seventy five per cent of the capital stock outstanding at the time of such mortgage lease or sale. The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz.:— So much of the annual net earnings of [fol. 9] the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:— To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when

so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, upon its production at such office or agency in order that such payment may be stamped hereon; or, if registered, payment will be made by check mailed to the person appearing on the books of this company as the registered owner hereof at the last address furnished by him to this company. This debenture shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted hereon, title thereto shall pass only by assignment executed by the last registered owner and noted on such register. This instrument shall not be [fol. 10] valid for any purpose unless authenticated by the signature of the Farmers' Loan and Trust Company to the certificate endorsed hereon.

In Witness Whereof the said Green Bay and Western Railroad Company has caused these presents to be duly executed under its corporate seal at the City of Green Bay this 1st day of July 1896.

Green Bay and Western Railroad Company, by S. S. Palmer, President.

Attest:

Mark T. Cox, Secretary.

The Farmers Loan and Trust Company hereby certifies that this is one of a series of Seven thousand of Class B Debentures of $1,000 each issued by the Green Bay & Western Railroad Company as therein set forth.

The Farmers Loan and Trust Company, by Wm. H. Leupp, Vice-President.

[fol. 11] EXHIBIT "B"

(Attached to Complaint)

Year	Net Earnings (after deducting reserves for additions, general improvement and depreciation)	Paid on Capital Stock	Paid on Class A Debentures	Net Earnings Payable on Class B Debentures
1924	$ 197,883.57	$ 125,000.00	$ 30,000.00	$ 42,883.57
1925	194,964.16	125,000.00	30,000.00	39,964.16
1926	192,795.67	125,000.00	30,000.00	37,795.67
1927	219,592.97	125,000.00	30,000.00	64,592.97
1928	229,278.75	125,000.00	30,000.00	74,278.75
1929	235,211.65	125,000.00	30,000.00	80,211.65

1930	245,491.57	125,000.00	30,000.00	90,491.57
1931	180,482.28	125,000.00	30,000.00	25,482.28
1935	171,161.66	125,000.00	30,000.00	16,161.66
1936	242,763.66	125,000.00	30,000.00	87,763.66
1937	308,110.51	125,000.00	30,000.00	153,110.51
1938	173,017.64	125,000.00	30,000.00	18,017.64
1939	243,505.48	125,000.00	30,000.00	88,505.48
1940	253,497.69	125,000.00	30,000.00	98,497.69
1941	301,165.54	125,000.00	30,000.00	146,165.54
1942	304,250.05	125,000.00	30,000.00	149,250.05
1943	591,446.00	125,000.00	30,000.00	436,446.00
Totals	$4,284,618.85	$2,125,000.00	$510,000.00	$1,649,618.85

[fol. 12]

EXHIBIT "C"

(Attached to Complaint)

Year	Net Earnings Payable on Class B Debentures	Amounts Actually Paid on Class B Debentures	Net Earnings Withheld
1924	$ 42,883.57	$ 35,000.00	$ 7,883.57
1925	39,964.16	35,000.00	4,964.16
1926	37,795.67	35,000.00	2,795.67
1927	64,592.97	35,000.00	29,592.97
1928	74,278.75	70,000.00	4,278.75
1929	80,211.65	70,000.00	10,211.65
1930	90,491.57	70,000.00	20,491.57
1931	25,482.28		25,482.28
1935	16,161.66		16,161.66
1936	87,763.66	70,000.00	17,763.66
1937	153,110.51	105,000.00	48,110.51
1938	18,017.64		18,017.64
1939	88,505.48	35,000.00	53,505.48
1940	98,497.69	35,000.00	63,497.69
1941	146,165.54	70,000.00	76,165.54
1942	149,250.05	70,000.00	79,250.05
1943	436,446.00	105,000.00	331,446.00
Totals	$1,649,618.85	$840,000.00	$809,618.85

[fol. 13] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant

(Civil Action No. 26-194)

NOTICE OF MOTION TO DISMISS FOR LACK OF JURISDICTION OVER PERSON

SIRS:

Please take notice that upon the annexed affidavit of Richard B. Wilson, sworn to the 17th day of June, 1944, and the affidavit of John A. Moore, sworn to the 16th day of June, 1944, the undersigned, appearing specially as attorneys for the defendant, Green Bay and Western Railroad Company, for that purpose alone, will move this Court at a motion term to be held in the United States Court House, Foley Square, Borough of Manhattan, City of New York, State of New York, on the 30th day of June, 1944, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons and complaint herein and dismissing the said complaint on the ground that the defendant, a railroad corporation organized and existing by virtue of the laws of the State of Wisconsin, is not doing business within the State of New York and, accordingly, that the Court lacks jurisdiction over the person of the defendant herein, and for such other and further relief as may be just and proper.

[fol. 14] Please take further notice that you are hereby required to serve any and all affidavits to be used in answering this motion on the undersigned at least five (5) days before the hearing of this motion.

Dated, New York, N. Y., June 19, 1944.

Yours, etc., Cadwalader, Wickersham & Taft, by Merrill M. Manning, Partner, Attorneys for Defendant, appearing specially, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York.

To Messrs. Unger & Pollack, Attorneys for Plaintiffs, 111 Broadway, Borough of Manhattan, New York, N. Y.

[fol. 15] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RICHARD B. WILSON, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

[Same Title]

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, ss:

RICHARD B. WILSON, being duly sworn, deposes and says, as follows:

1. He resides in the State of New York and his principal occupation is that of General Partner in the firm of Robert Winthrop & Co., Stock and Bond Brokers, with membership on the New York Stock Exchange and offices at No. 20 Exchange Place, New York, N. Y. He is also a Director and Assistant Secretary and Assistant Treasurer of Green Bay and Western Railroad Company, the defendant in the above entitled action. He makes this affidavit in support of a motion by the defendant to set aside the service of the summons and complaint herein and to dismiss for lack of jurisdiction by the Court over the person of the defendant.

2. This action was attempted to be commenced in the Supreme Court, New York County, by service of the summons and complaint on deponent as Assistant Secretary and Assistant Treasurer of the defendant, such service being made on April 26, 1944, at the office of Robert Winthrop & Co., 20 Exchange Place, New York, N. Y.

3. On May 16, 1944, the action was duly removed to this Court by the filing with the Supreme Court of the State of New York, County of New York, of a petition for removal and the required surety bond and by the filing in this Court on June 15, 1944 of a duly certified copy of the transcript of record of the action in the Supreme Court of the State of New York, County of New York. Notice of the filing of said transcript of record was duly served on the attorneys [fol. 16] for the defendant on June 15, 1944. Defendant's time to plead is to and including June 20, 1944 and has not yet expired.

4. The gravamen of the single cause of action alleged in the complaint is to cause such a construction of the provi-

sions of the certificate of incorporation and the Class B Debentures of the defendant in such a fashion that would require the defendant railroad corporation, without exercise of discretion by the directors, to pay out to holders of Class B Debentures all of its surplus earnings for each year since 1924, after making fixed payments limited to 5% and no more on the face amount of Class A Debentures and par amount of Common Stock, the Class A Debentures and Common Stock being senior securities to the Class B Debentures.

5. The defendant appears specially herein for the sole purpose of moving to set aside the service of the summons and complaint herein upon the grounds that at the time of the attempted commencement of said action the defendant was a foreign corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and was not doing business within the State of New York, that the Court has no jurisdiction over the person of the defendant.

6. The defendant is a foreign corporation, organized and existing under and by virtue of the laws of the State of Wisconsin and all of its railroad lines, stations and other physical properties are situated in the State of Wisconsin. Defendant has never filed a certificate in the State of New York to authorize it to do business nor has it designated a person within the State of New York upon whom process may be served, nor does it pay taxes to the State of New York. Its principal and general offices are situated in Green Bay, Wisconsin, where its president and all of its operating officers reside and have their offices, from which the operations of the railroad are conducted. These executive and operating officers are as follows:

[fol. 17] President—Homer E. McGee; Purchasing Agent and Assistant Treasurer—J. M. Zahorik; General Auditor—Louis P. Wohlfeil; Chief Engineer—F. S. Halliday.

The cash books of the Company are kept at the Green Bay office, showing daily receipts, collection of accounts due, operating records, pay roll records, statements of claims, etc. No books of the Company concerning its railroad business are kept at any other office. The defendant maintains a bank account in Green Bay, Wisconsin, where the receipts from the operation of the railroad are deposited and where checks for operating expenses are drawn and signed.

7. Charles W. Cox, a General Partner of the said stock exchange firm of Robert Winthrop & Co., is a Director of the defendant railroad corporation and is also Secretary and Treasurer. He resides in the State of New Jersey and practically all of the time which he devotes to business affairs is spent in the pursuit of his duty as a partner of Robert Winthrop & Co. at the New York offices of that firm. He receives a salary aggregating $2,000 per year from the railroad corporation, which amount is paid by checks signed in Green Bay, Wisconsin, and mailed to him from that office. This salary of $2,000 is in essence a payment for services in connection with the supervising of transfers of the railroad corporation's stock, payment of dividends, and payment of income distributions to holders of Class A and Class B Debentures, etc., which activities are referred to in more detail in paragraph "9" hereof. As Secretary and Treasurer he performs no duties in connection with the operation of the railroad.

8. Deponent is, as hereinabove stated, a General Partner of Robert Winthrop & Co. and is also a Director and Assistant Secretary and Assistant Treasurer of the de- [fol. 18] fendant. His duties as such officer are confined practically solely to the supervision of stock transfers and other details relating to distributions on the various outstanding securities of the defendant and related questions. He receives no salary from the defendant.

9. The capitalization of the defendant railroad corporation consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock, and $7,000,000 face amount of Class B Debentures. All of these securities are listed on the New York Stock Exchange and transfer and payment offices in New York City are required under the rules of the New York Stock Exchange. Instead of employing an outside bank or trust company to act as transfer agent and paying agent, these details are conducted at the office of Robert Winthrop & Co. at 20 Exchange Place, under the direction of Mr. C. W. Cox, Secretary and Treasurer, and deponent as Assistant Secretary and Assistant Treasurer. The clerical staff of Robert Winthrop & Co. is utilized to the extent necessary for these purposes and that firm is paid approximately at the rate of $2,000 per year for such services; also, as hereinbefore stated, $2,000 is paid to Mr. Cox. Deponent is informed and believes that the sum

of $4,000 is a fair and reasonable charge for the services as so performed by Mr. Cox and his firm and that it would cost at least that sum and probably more if an outside bank or trust company was called upon to perform them. The office of Robert Winthrop & Co., at 20 Exchange Place, New York, N. Y., is an agency office for payment of distributions declared and payable on Class A and Class B Debentures of the defendant and for the transfer of such securities and of the stock of the defendant. In no other sense is it an office of the said railroad corporation. The railroad corporation's name does not appear upon the Bulletin Board of the Building, nor upon any of the doors of the offices occupied by Robert Winthrop & Co. In connection with sending out distribution checks and returning bearer Debentures to their [fol. 19] respective owners, after presentation for notation of interest payments, a letterhead of the railroad corporation is used with the address shown as 20 Exchange Place, New York, N. Y. (which, as hereinabove stated, is the office of Robert Winthrop & Co.).

10. A bank account is maintained in New York mainly in connection with prospective payments of distributions o securities of the defendant corporation, although at irregular times when there appeared to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred to a bank account in New York.

11. Over a period of years the defendant railroad corporation has maintained a traffic office in New York City, the present address of which is 350 Madison Avenue, in charge of John A. Moore. Mr. Moore's duties are confined solely to the solicitation of freight business over the lines of the defendant railroad after it has been carried by an initial carrier which receives the shipment in the State of New York, or other point of origin. The bills of lading and all contracts in relation thereto are made by the shipper direct with the initial carrier and Mr. Moore has nothing to do whatsoever with consummating the shipping arrangements nor does he have any authority to make collections, settling claims, or entering into contracts on behalf of the defendant. The office force consists of the agent, Mr. Moore, and his secretary. The lease for the space was signed by the President of the defendant in Green Bay, Wisconsin, and checks for the rental and for payment of salaries and expenses of

the traffic office are forwarded to New York from Green Bay. No passenger tickets are sold at this office or any other place within the state. An affidavit of Mr. Moore is annexed hereto.

12. Solely for the convenience of Directors, it has been customary to hold directors' meetings in New York City at the office of Robert Winthrop & Co. Two of the Directors [fol. 20] are residents of New Jersey and two are residents of New York City. In the calendar year 1943, four such meetings were held. Stockholders' meetings are held in Green Bay, Wisconsin, as required by statute.

13. As hereinbefore stated, the capitalization of the defendant railroad corporation consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock, and $7,000,000 face amount of Class B Debentures. The Class A Debentures and the Common Stock are securities senior to the Class B Debentures and are entitled to receive maximum income distributions of 5% of their face or par amount in any year before Class B Debentures receive any payment. The Class B Income Debentures are therefore the junior equity securities. These securities were originally issued pursuant to a plan of reorganization of the Railroad in the year 1896 and have been outstanding since that time.

14. The defendant has fully stated the facts in this case to one of its counsel, Merrill M. Manning, a member of the firm of Cadwalader, Wickersham & Taft, 14 Wall Street, New York, N. Y., and the defendant has been advised by said firm that it has good and substantial defenses on the merits to the cause of action alleged in the complaint.

Wherefore, deponent prays that this Court issue an order setting aside the service of the complaint and dismissing the complaint for lack of jurisdiction over the person of the defendant and for such other and further relief as may be just.

Richard B. Wilson.

(Sworn to the 17th day of June, 1944.)

[fol. 21] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN A. MOORE, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

STATE OF NEW YORK,
County of New York, ss:

JOHN A. MOORE, being duly sworn, deposes and says:

I am employed by the defendant, Green Bay and Western Railroad Company, as an Assistant General Freight Agent and have been so employed for a number of years. At one time my title was that of General Eastern Agent. In recent years, the title was changed to my present title so that I could continue in the employ of the company and meet the requirements of the Railway Retirement Act. My duties under both of the said titles have been and are the same. I have my office, which bears Room No. 713, in the building at 350 Madison Avenue, Borough of Manhattan, City of New York. The only occupants of that office are myself and a clerk. The office is about twenty feet square and contains three desks and about a half dozen chairs, two steel filing cabinets for correspondence, and some stationery.

The Official Guide of Railways, issued by the National Railway Publishing Company of 424 West 33rd Street, New York City, and used extensively in the railroad world, at page 229, sets forth in substance as follows:

"GREEN BAY AND WESTERN RAILROAD COMPANY
KEWAUNEE, GREEN BAY AND WESTERN RAILROAD COMPANY

THE ANNAPEE AND WESTERN RAILWAY COMPANY

General Offices—Green Bay, Wisconsin

Executive

Homer E. McGee, President — Green Bay, Wisconsin

[fol. 22]

Operating

F. S. Halliday, Chief Eng. and Engr. Maintenance of Way — " " "
T. M. Kirkby, Chief Mechanical Officer — " " "

E. V. Johnson, Gen. Supt. Transp. " " "
A. H. Schaeffer, Asst. to President " " "
J. C. Hill, Supt. Track Maintenance " " "
G. O. Eiler, Freight Claim Agent " " "

Traffic

L. C. Jorgensen, Traffic Mgr. " " "
G. H. Chapman, Genl. Freight Agent " " "

Accounting, Treasury and Purchasing

L. P. Wohlfeil, Gen. Auditor and Asst. Treasurer " " "
L. F. Bridenhagen, Asst. Genl. Aud. and Car Accountant " " "
Chas. W. Cox, Secy. and Treas. 20 Exchange Pl. New York City
J. M. Zahorik, Purchasing Agent Green Bay, Wisconsin
T. A. Stinson, Gen'l. Storekeeper " " "

Traffic Agencies

(11 agencies are mentioned, including the following):

New York 17, N. Y.,—Phone Murray Hill 6-8135 713 Borden Bldg. John A. Moore, Asst. Genl. Freight Agent"

[fol. 23] No passenger tickets are sold by me nor do I engage in the issuance of time tables. I do keep a few of them in by possession for my own information. The time tables I have seen list the general offices of the said railroad company as Green Bay, Wisconsin, and mention my name and a number of other names of persons in various cities as traffic representatives.

My duties relate solely to the solicitation of freight business over lines of the defendant in Wisconsin affer its carriage by an initial carrier, receiving the shipment in New York, or other point of origin. I do not consummate

shipping arrangements nor make collections, nor settle claims, nor do I make contracts. All of those matters are attended to at the office of the Company in Green Bay, Wisconsin. My function is to influence shippers of goods, to use the line of the defendant railroad company in Wisconsin as a part of the avenue of transportation of such goods. I make all reports of any business I solicit to the office of the company in Green Bay, Wisconsin, and to no other office. All of the busjness I solicit is reported by me to that office and all decisions and approvals are made there. The freight rates are fixed by schedule of the Interstate Commerce Commission. No payments whatever are made to me. The payments are billed from and made to the said defendant in the state of Wisconsin.

I am not an officer of the defendant and have no authority to negotiate or enter into contracts or agreements on its behalf, nor to represent it in any way other than as heretofore stated.

All expenses for maintaining my agency at 350 Madison Avenue, aforesaid, including salaries, are arranged for and paid from the office of the defendant in Green Bay, Wisconsin. The checks which I receive from that office are signed by the auditor of the company, Mr. Louis P. Wohlfeil, General Auditor of the company, who resides in Green Bay, aforesaid.

[fol. 24] The main business of the defendant is the transportation of freight on its lines in Wisconsin. There is very little passenger traffic.

In connection with the business of the company, I have occasion to travel and have, from time to time, visited the office of the company in Green Bay, Wisconsin. The various offices of the company are located on the first and second floors of the railroad station in the City of Green Bay.

I make no reports to, nor do I receive any from, Robert Winthrop & Company at 20 Exchange Place, New York City, nor do I or my secretary refer any inquiry to that office, other than when someone makes inquiry about the payment of interest or dividends on the securities, issued by the defendant.

John A. Moore.

(Sworn to the 16th day of June, 1944.)

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AMENDING NOTICE OF MOTION

[Same Title]

It is hereby stipulated that the Notice of Motion herein be amended by adding the following clause, to wit:

> "The defendant also moves to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation";

It is further stipulated that the plaintiffs reserve and do not waive their rights to object to such motion to dismiss on the ground that it may not properly be made until the motion to vacate service of the summons is disposed of;

It is further stipulated that the defendant shall serve its memorandum in support of this amended part of this motion on the plaintiffs' attorneys on July 20th, 1944 and that the plaintiffs shall have until July 24, 1944, to serve and file answering affidavits and a memorandum.

Dated: New York, N. Y., July 18, 1944.

Unger & Pollack, Attorneys for Plaintiffs. Cadwalader, Wickersham & Taft, Attorneys for Defendant, appearing specially.

[fol. 26] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF WILLIAM F. UNGER, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

STATE OF NEW YORK,
County of New York, ss:

WILLIAM F. UNGER, being duly sworn, deposes and says:

I am a member of the firm of Unger & Pollack, attorneys for the plaintiffs in the above entitled action. I make this affidavit in opposition to the motion of the defendant to set aside the service of the summons and complaint in this action on the alleged ground that it is not doing business within the State of New York.

At the outset, I desire to call attention to a decision rendered by Mr. Justice Garvin of the New York Supreme Court in an action involving this defendant on the very issue raised by the present motion. In an opinion published in the New York Law Journal of June 6, 1944, a copy of which is annexed hereto marked Exhibit A, in an action entitled Paul Sperling, etc., v. H. E. McGee, et al., in which action Green Bay and Western Railroad Company is named as a defendant, it was held that the Green Bay and Western Railroad Company was doing business within the State of New York and subject to the jurisdiction of the New York Courts. A motion by the defendant in that action to set aside service of the summons and complaint therein was accordingly denied. The opinion written by Mr. Justice Garvin recites in detail the facts as to the presence of the defendant in the State of New York as they appeared in that action.

The present action was commenced in the Supreme Court of the State of New York, County of New York, by service of the summons and complaint on Richard B. Wilson, Assistant Secretary and Assistant Treasurer of the defendant, on April 26, 1944, at 20 Exchange Place, New York, N. Y. On petition filed by the defendant, the action was thereafter removed to this Court.

The action is brought by three individual residents of the City of New York as holders of Class B debentures issued by [fol. 27] the defendant, on behalf of themselves and all other holders of such Class B debentures, to recover the amounts payable on such debentures in lieu of interest and to compel a distribution of earnings in accordance with the provisions of the defendant's Articles of Incorporation and the debentures issued thereunder. Such amounts are, by the express provisions of the debentures, payable "at the office or agency of the Company in the City of New York" upon "production" of the debentures "at such office or agency". The debentures which were first issued in 1896, further provide that they "shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted thereon, title shall pass only by assignment executed by the last registered owner and noted on such register."

Each debenture specifically provides as follows:

"This instrument shall not be valid for any purpose unless authenticated by the signature of the Farmers'

Loan and Trust Company to the certificate endorsed thereon."

The Farmers' Loan and Trust Company (now City Bank-Farmer's Trust Company) is located in the City of New York and presumably the debentures were authenticated in the City of New York.

On the back of each debenture there is printed in large type:

"Interest Payable
at the office or agency of the Company
in the
City of New York."

From the statements contained in the defendant's own moving affidavits on the present motion, the annexed affidavit [fol. 28] of Ludwig Mandel, an associate of my firm, as well as from the various affidavits filed in the *Sperling* action the following facts appear beyond dispute:

1. The defendant maintains and for many years has maintained two separate offices within the City of New York. One such office is located at 20 Exchange Place (formerly at 48 Wall Street); the other at 350 Madison Avenue.

The office at 20 Exchange Place is maintained with Robert Winthrop & Company, a stock exchange firm, three of whose partners are directors of the defendant. Of these three directors one, Charles W. Cox, is Secretary and Treasurer of the defendant, and receives a salary of $2,000 per annum from the defendant in such capacity. Another, Richard B. Wilson, is Assistant Secretary and Assistant Treasurer of the Company. A fourth director, C. Ledyard Blair, who is Vice-President of the defendant, maintains his office at One Wall Street in the vicinity of 20 Exchange Place. In addition to the salary paid to Mr. Cox, the sum of $2,000 is paid by the defendant annually to the firm of Robert Winthrop & Company for the use of its clerical staff and facilities. All stock and debenture transfers are effected at this office. The stock transfer books of the company are kept at this office. All dividends and distributions to debenture holders are either paid at or mailed from this office.

The office at 350 Madison Avenue is occupied solely by the defendant and its employees under a lease carried in the name of the defendant. At the latter office, John A. Moore,

Assistant General Freight Agent of the Company, is constantly in attendance, as is at least one other employee of the defendant. The said Moore was formerly designated as "General Eastern Agent", but his duties have not changed since such change in his title. The office is primarily a traffic office, from which the defendant solicits and arranges for the routing of freight business. The defendant's passenger business is insignificant, by its own admissions; hence it is apparent there is no need for a passenger agent in this state.

[fol. 29] 2. Five of the six directors of the defendant (as of December 31, 1943 there was apparently one vacancy on the Board) have their office addresses within the City of New York, and at least two of such directors also reside in the City of New York and two others reside in the adjoining State of New Jersey.

3. Directors' meetings are held regularly in the City of New York, in accordance with the by-laws of the defendant. Four such meetings were held in 1943. Presumably the minutes of such meetings are kept at the company's office at 20 Exchange Place.

4. Three executive officers of the defendant are located in New York. They are the Vice-President, C. Ledyard Blair, the Secretary and Treasurer, Charles W. Cox, and the Assistant-Secretary and Assistant-Treasurer, Richard B. Wilson. In addition, John A. Moore, Assistant General Freight Agent of the defendant, is permanently stationed in New York.

5. Two of the three members of the Executive Committee appointed by the Board of Directors are located in New York, namely C. Ledyard Blair and Charles W. Cox. The third member of the Executive Committee is Homer E. McGee, the President of the Company, who resides and maintains his office in Green Bay, Wisconsin. This Executive Committee is "authorized to do all the acts and things that the Board of Directors may legally do", during intervals between directors' meetings.

6. The capital stock and debentures issued by the Company are all listed and traded in on the New York Stock Exchange, and all are transferrable in the City of New York.

7. A letterhead of the defendant shows its address at 20 Exchange Place, New York, N. Y.

[fol. 30] 8. The defendant is listed in the Manhattan telephone directory as follows:

"Green Bay & Western RR Co 350 Mad Av MUrryhill 6-8135"

There is a similar listing in the Manhattan Classified directory under the heading "Railroads".

9. The defendant concedes that it maintains a bank account in New York, and "when there appears to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred," to such account in New York (Wilson moving affidavit, par. 10).

10. The defendant paid an occupancy tax to the City of New York in 1942 and in 1943, and probably in prior years as well.

11. In the registration statement (form 12) filed by the defendant in 1935 with the Securities and Exchange Commission, the name and address of the person authorized to receive notices on behalf of defendant was stated to be "Charles W. Cox, Secretary, Green Bay and Western Railroad Company, 48 Wall Street, New York, N. Y." Annual reports (form 12K) filed by the defendant with the Securities and Exchange Commission contain an attestation clause indicating that each such report, including that filed for the year 1943, had been signed by H. E. McGee as president, and by C. W. Cox as Secretary, and the corporate seal affixed, in the City of New York.

12. The annual report filed by the defendant with the Interstate Commerce Commission for the year ended December 31, 1943 lists five of its six present directors as having New York addresses and in addition lists its Vice-President and Secretary and Treasurer as having their addresses in [fol. 31] New York. In such report, the thirty largest stockholders are stated to own an aggregate of 20,633 shares out of a total of 25,000 outstanding, and twenty-six of these thirty stockholders are listed as having their addresses in New York.

13. An "Official Directory of Industries" published by the defendant in 1943, lists on page 4 thereof the following:

> "New York, N. Y. Room 713 Borden Bldg. 350 Madison Ave. Phone Murray Hill 6-8135. John A. Moore, Assistant General Freight Agent —— ——, General Agent. Sunye Tabenken, Clerk."

On such page also appears the following statement under the heading "Executive Department":

> "Homer E. McGee, President, Green Bay, Wis. Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y. Chas. W. Cox, Secretary & Treasurer, 20 Exchange Place, New York, N. Y."

Since the publication of said booklet Edgar Palmer has died, and C. Ledyard Blair of 1 Wall Street, New York, N. Y. has been elected Vice-President, as appears from the defendant's annual report filed with the Interstate Commerce Commission for the year ended December 31, 1943.

14. A timetable published by the defendant and dated December 1939, under the heading of "Traffic Representatives" lists, among others, the following:

> "New York, N. Y. Room 713 Borden Building, John A. Moore, General Eastern Agent Lawrence J. Kelly, Travelling Freight Agent."

[fol. 32] 15. Reports filed with the Interstate Commerce Commission by the defendant's subsidiary, Kewaunee, Green Bay and Western Railroad Company give the address of the defendant as 20 Exchange Place, New York City. These reports are signed by H. E. McGee, who is President of both the defendant and its subsidiary.

16. In Moody's Manual of Investments for 1936 the defendant was listed as having a New York office at 48 Wall Street, New York City, and under the heading "Management" appears the name "C. W. Cox, Chairman, Secretary and Treasurer, New York." Moody's Manual of Investments for 1943 lists the New York office of defendant corporation as 20 Exchange Place, New York City. Standard & Poor's Manual for 1943 lists an office for defendant at 350 Madison Avenue, New York City.

17. As stated in the affidavit of John A. Moore filed on behalf of the defendant in the *Sperling* action, the Official Guide of Railways issued by the National Railways Publishing Company and used extensively in the railroad world sets forth the following:

"Traffic Agencies

* * * * * * *

New York 17, N. Y.,—Phone Murray Hill 6-8135 713 Borden Bldg. John A. Moore Ass't Gen'l Freight Agent."

From the foregoing facts, many of which may be found in the moving affidavits themselves, it is apparent that the defendant is constantly and continuously present in and doing business within the State of New York and hence subject to the process of the courts in this jurisdiction.

Wherefore, I respectfully pray that the defendant's motion be denied in all respects.

Wm. F. Unger.

(Sworn to the 12th day of July, 1944.)

[fol. 33] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LUDWIG MANDEL, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

[Same title]

STATE OF NEW YORK,
County of New York, ss:

Ludwig Mandel, being duly sworn, deposes and says:

I am an attorney associated with Unger & Pollack, attorneys for the plaintiffs in the above entitled action.

On March 31, 1944 I went to the office of defendant Green Bay and Western Railroad Company at the Borden Building, 350 Madison Avenue, New York City. The defendant occupies an office in said building known as Room 713. The

directory in the lobby of the building lists the Green Bay and Western Railroad Company as well as John A. Moore. There is also a listing on the lobby directory for a Ralph G. Carlson. On the 7th floor on the entrance door to Room 713 the words "Green Bay and Western Railroad Company" appear in large lettering. In smaller letters to the side appears the following:

"John A. Moore Ass't General Freight Agent."

I entered the office and spoke to a young lady seated at a desk in the outer room, in which there were several desks. There are several inner or private offices. The young lady with whom I spoke informed me that the "Treasurer's office" of Green Bay and Western Railroad Company was at 20 Exchange Place, New York City, with Robert Winthrop & Co. I asked her whether any of the officers of Green Bay and Western Railroad Company were to be found at the uptown office. She answered in the negative, stating that Mr. Cox, the Treasurer, was at the downtown office. She further stated that the office at 350 Madison Avenue was used for "solicitation and routing of freight." [fol. 34] I examined a number of reports at the New York Stock Exchange library filed by Green Bay and Western Railroad Company with the Securities and Exchange Commission and with the Interstate Commerce Commission.

On examining the registration statement filed with the Securities and exchange Commission (Form 12), dated May 9, 1935, I found that it had been executed by H. E. McGee as President and C. W. Cox as Secretary. In this statement it was stated that the name and address of the person authorized to receive notices on behalf of the defendant was "Charles W. Cox, Secretary, Green Bay and Western Railroad Company, 48 Wall Street, New York, N. Y." Attached to said Form 12 as an exhibit was a copy of the by-laws of the defendant corporation. Section 2 of Article II thereof reads as follows:

> "The directors may hold their meetings and keep books of the company, except the company s general and principal books of account and stock books which

shall be kept in the State of Wisconsin, *in the State of New York* and at such other place or places within or without the State of Wisconsin as the Board of Directors may from time to time determine." (Emphasis supplied.)

Section 1 of Article II provides for seven directors. Sections 1 and 2 of Article III deal with the appointment and duties of an Executive Committee. Section 1 provides:

"The Board of Directors may in its discretion by resolution adopted by a majority of the whole Board designate an Executive Committee composed of not less than three members of the Board. The Executive Committee shall elect from among its members its own chairman."

[fol. 35] Section 2 provides:

"During the intervals between the meetings of the Board of Directors, the Executive Committee shall possess and may exercise all the powers of the Board of Directors * * *"

Section 5 of Article IV of said by-laws provides:

"The Secretary shall keep the minutes of all meetings of the Board of Directors and of the stockholders and such other minutes and books and records as the Board of Directors may direct; he shall keep in safe custody the seal of the company * * *"

I examined also the annual reports filed by the defendant with the Securities and Exchange Commission (Form 12K), including the annual report for the year ended December 31, 1943. I found that each of such reports contained an attestation clause indicating that it had been signed by H. E. McGee as President, and by C. W. Cox as Secretary, and the corporate seal affixed, *in the City and State of New York.*

I examined also the annual report filed by the defendant with the Interstate Commerce Commission for the year

ended December 31, 1943. The following were listed as the directors of the company:

Name	Director's Office Address	Date of Beginning of Term 1943	Date of Expiration of Term 1944	No. of Voting Shares Owned of Record
C. Ledyard Blair	1 Wall St., New York.	May 13	May 11	2
Charles W. Cox	20 Exchange Place, New York.	"	"	1800
[fol. 36]				
Robert Winthrop	20 Exchange Place, New York.	"	"	1
J. M. Davis	140 Cedar Street, New York.	"	"	51
H. E. McGee	Green Bay, Wisconsin.	"	"	1200
Richard B. Wilson	20 Exchange Place, New York.	"	"	796

The following were listed as the general officers of the company:

Title	Department or Departments Over Which Jurisdiction is Exercised	Name of Person Holding Office at Close of Year
President	Executive	H. E. McGee, Green Bay, Wisconsin.
Vice-President	Executive	C. L. Blair, 1 Wall St., N. Y.
Secretary	Fiscal	C. W. Cox, 20 Exchange Place, New York.
Treasurer	Treasury	C. W. Cox, 20 Exchange Place, New York.
General Auditor	Accounting	L. P. Wohlfeil, Green Bay, Wisconsin.
Purchasing Agent	Purchasing	J. M. Zahorik, Green Bay, Wisconsin.
Chief Engineer	Way and Structure	F. S. Halladay, Green Bay, Wisconsin.

[fol. 37] In said report to the Interstate Commerce Commission it was stated that as of December 31, 1943, the 30 largest stockholders owned an aggregate of 20,633 shares of stock out of a total of 25,000 outstanding. Of these 30, all but four were listed as having New York addresses.

The report also indicated that during the year 1943 the defendant had paid a New York tax in the sum of $1.00. A similar tax was paid in the year 1942, as appears from a similar report filed for the year ended December 31, 1942.

In said report the Chairman of the Board of Directors is stated to be C. W. Cox, and the Secretary of the Board is stated to be Robt. Winthrop.

The Executive Committee is stated to consist of the following persons:

C. Ledyard Blair
Charles W. Cox
H. E. McGee

There is also a statement that "the Executive Committee is authorized to do all the acts and things that the Board of Directors may legally do." A similar statement is contained in the report to the Interstate Commerce Commission for the year ended December 31, 1941.

In the annual report filed with the Interstate Commerce Commission for the year 1942 by Kewaunee, Green Bay and Western Railroad Company, signed by H. E. McGee as President, the defendant Green Bay and Western Railroad Company is listed as a security holder and its address is stated as 20 Exchange Place, New York, N. Y.

I have seen a copy of an "Official Directory of Industries" published by the defendant in 1943. On page 4 thereof appears the following:

"New York, N. Y. Room 713 Borden Bldg. 350 Madison Ave. Phone Murray Hill 6-8135. John A. Moore, Assistant General Freight Agent. —— ——, General Agent. Sunye Tabenken, Clerk."

[fol. 38] Under the heading "Executive Department", there also appears the following:

"Homer E. McGee, President, Green Bay, Wis. Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y. Chas. W. Cox, Secretary & Treasurer, 20 Exchange Place, New York, N. Y."

Ludwig Mandel.

(Sworn to the 12th day of July, 1944.)

Exhibit "A"

(Attached to Opposing Affidavit of William F. Unger)

Opinion of Mr. Justice Garvin of the New York Supreme Court, Kings County, in an Action Entitled Paul Sperling, etc., v. H. E. McGee et al., Published in the New York Law Journal of June 6, 1944

Defendant Green Bay & Western Railroad Company moves to set aside the service of the summons and complaint on the ground that defendant is a foreign corporation organized under the laws of the State of Wisconsin, is not transacting business within the State of New York and that consequently the court has no jurisdiction of the person of defendant, and further, that said service is in violation of the Constitution of the United States, and particularly section 1 of the Fourteenth Amendment thereof.

The moving affidavit of Richard B. Wilson, upon whom service was made, sets forth in part the following facts which do not appear to be in dispute: He is a resident of the State of New York and a general partner in the firm [fol. 39] of Robert Winthrop & Co., stock and bond brokers, having a membership on the New York Stock Exchange and offices at No. 20 Exchange place, New York City; in addition, he is a director and assistant secretary and assistant treasurer of said company; that a charter to said company was issued by the State of Wisconsin, but the company has not filed a certificate of doing business in New York State, nor has it designated a person within this state upon whom process may be served. All its railroad lines, stations and physical properties are situated in the State of Wisconsin; its principal office is at Green Bay, where its president and most of its other operating officers reside and have their offices from which operation of the railroad is carried on. No books of the company having to do with its business are in New York; its main operating bank account is in Green Bay; Charles W. Cox, another general partner of said Robert Winthrop & Co., is a director of the company, and he is also its secretary and treasurer; although he resides in New Jersey, he devotes most of his time to the pursuit of his duties as a partner of said firm at No. 20 Exchange Place, New York City; he receives a salary of $2,000 a year as secretary and treasurer of the company.

The duties of Wilson as assistant secretary and assistant treasurer of the company are confined practically to nothing more than the supervision of stock transfers and other details relating to distribution on the various outstanding securities and related questions; he receives no salary from the company. The Class A Debentures and Class B Debentures are payable "at the office or agency of the company in the City of New York"; the capital stock of the company is transferable in the same place. The company does not employ an outside bank or trust company to act as transfer agent or paying agent; these details are attended to at the office of Robert Winthrop & Co., at No. 20 Exchange Place, under the direction of Cox, secretary and treasurer and Wilson as assistant secretary and assistant treasurer. The clerical force of Robert Winthrop & Co. is used to the extent [fol. 40] necessary for three purposes; that firm is paid about $2,000 a year for their services. Largely for requirements in connection with sending out distribution checks and returning bearer debentures to their owners after presentation for notation of interest payments, a letterhead of the company is used with the address shown as No. 20 Exchange Place, New York, N. Y.

A bank account is maintained in connection with prospective payments of distributions and securities of the company, and at times when there appeared to be an excess of operating funds in the Green Bay banks, a portion of such funds have been temporarily transferred to the company's bank account in New York. Up to the time of his death in January, 1943, Edgar Palmer, a vice-president and director of the company, resided and was available to it, when needed, in the New York area.

For a period of years the company has maintained a traffic office in New York City, which is now at No. 350 Madison avenue, in charge of John A. Moore; his duties are limited to the solicitation of freight business for trans-shipment over the lines of the company in Wisconsin; the office force consists of the agent Moore and his secretary; the lease for the space was signed by the president of the company in Green Bay and all expenses and salaries are paid by checks issued in Green Bay; no passenger tickets are sold at this office nor at any other office within New York State; directors' meetings are usually held in New York City at the said office of Robert Winthrop & Co.; during 1943, four such meetings were held; two of the directors reside in

New Jersey, two in New York; stockholders' meetings are held in Green Bay, Wisconsin.

In the building at No. 20 Exchange place are located the offices of Robert Winthrop & Co., as stated, the Estate of Edward Palmer (former vice-president of the company) and City Bank Farmers Trust Company, trustees of the debentures; the name of the defendant company does not appear upon the bulletin board of the aforesaid building, nor upon any of the doors of the office occupied by the said brokerage firm.

[fol. 41] The corroborating affidavit of John A. Moore adds additional facts, the most important of which are that he is an assistant general freight agent and that formerly his title was that of General Eastern Agent, although his duties under both titles have been and are the same; that the Official Guide of Railways lists the general office of the company at Green Bay and the office at No. 350 Madison avenue, as one of the eleven traffic agencies; that he is not engaged in the solicitation of business to be brought into the State of New York.

It appears that the Madison avenue office is listed in the telephone book under the company's name and is also listed in the directory in the building under the name "Green Bay and Western Railroad Company, John A. Moore, Assistant General Freight Agent".

It is stated in the company's annual report to the Interstate Commerce Commission for the year ended December 31, 1942 (the latest report available), that Cox is the fiscal officer and in charge of the treasury department of the company; his address is given as No. 20 Exchange place, New York, N. Y.

The company has an executive committee, consisting of three persons, namely, C. Ledyard Blair of No. 1 Wall street, New York City, Charles W. Cox of No. 20 Exchange place, New York City, and H. E. McGee of Green Bay, Wisconsin, which committee "has authority to do all the acts and things that the board of directors may legally do;" it is asserted, and not controverted, that there have been no executive committee meetings during the last twenty years.

In Moody's Manual of Investments of 1936, the company was listed as having a New York office at No. 48 Wall street, New York City, and under the heading of "Management" appeared the name "C. W. Cox, Chairman, Secretary and Treasurer, N. Y." The same manual for 1943 lists the New

York office of the company as No. 20 Exchange place, New York City. Standard & Poors Manual for 1943, lists an office for the company at No. 350 Madison avenue. A time [fol. 42] table of the company under the heading "Traffic Representatives" lists, among others, John A. Moore as general eastern agent, with his office at No. 350 Madison avenue. The "Official Directory of Industries" prepared by the defendant railroad's "Freight Traffic Department", sets forth on page 4 thereof the following: "Homer E. McGee, President Green Bay, Wisconsin; Edgar Palmer, Vice-President, 20 Exchange Place, New York, N. Y.; Chas. W. Cox, Secretary and Treasurer, 20 Exchange Place, New York, N. Y.".

No comprehensive rule has ever been established determining what constitutes doing business by a foreign corporation so as to subject it to process in a given jurisdiction. Each case must be determined upon its own facts (*St. Louis Southwestern R'y* v. *Alexander*, 227 U. S. 218; *Pomeroy* v. *Hocking Valley R'y*, 218 N. Y., 530).

It has been held that not so great a degree of business activity is required to authorize service as in the case of taxing or licensing; it is sufficient if there be enough to warrant the inference that the foreign corporation is present in the state (*Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *Internat. Text Book Co.* v. *Tone*, 220 N. Y., 313).

The brief of the moving defendant discusses the merits of the action, but for the purposes of this motion there should be no inquiry of that character.

The question which the court must decide is whether from all the facts and surrounding circumstances hereinbefore set forth, it may be reasonably held that the company is engaged in business in New York State, to such an extent as to subject it to process in this jurisdiction.

If each of the foregoing facts were to be considered separately, as a sole basis upon which to predicate a conclusion, then the objection of the company would be valid. In other words, the conduct of this freight agency in New York would not, in and of itself, constitute doing business in New York State; the fact that the obligations of the company were payable here would not, taken alone, constitute doing business [fol. 43] in New York State; the same is true of the fact that the corporation stock was transferable and its dividends were paid at the office of Robert Winthrop & Co.; also the presence of an officer and the occasional meetings of di-

rectors in this state would not be doing business here. But, when all these activities are taken together, in addition to the fact that the directors usually meet in New York, that the company maintains a bank account here which admittedly contains funds other than those required to meet prospective payments of distributions on the securities, the court is constrained to the conclusion that the said foreign corporation is present in New York and is, therefore, subject to the process of our courts. The various references to the company in the manuals, without objection or correction, indicate not only that the company had no objection to being considered a part of the business world of New York, but that it was quite willing that such an impression should be accepted by those having occasion to do business with it, as true.

Paraphrasing the language of the court in *Tauza* v. *Susquehana Coal Co.* (supra) from the facts hereinbefore recited, it may be clearly inferred that the company is here, not occasionally or casually, but with a fair measure of permanence and continuity and that therefore the service upon Richard B. Wilson was good. The motion to set aside the service herein is denied.

[fol. 44] IN UNITED STATES DISTRICT COURT

REPLY AFFIDAVIT OF RICHARD B. WILSON, READ IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

[Same title]

(Civil 26-194)

STATE OF NEW YORK,
County of New York, ss:

Richard B. Wilson, being duly sworn, deposes and says as follows:

1. This reply affidavit is made in support of a motion to set aside the service of the summons and complaint herein and in reply to the answering affidavits of William F. Unger and Ludwig Mandel, both sworn to July 12, 1944.

2. In the action between *Paul Sperling, etc.* v. *H. E. McGee, et al.*, wherein Green Bay and Western Railroad

Company is also named as defendant, an order was signed by the Supreme Court, Kings County, through Mr. Justice Edwin L. Garvin, denying the motion of the said defendant to set aside service of the summons and complaint. An appeal has been taken therefrom to the Appellate Division of the Supreme Court, Second Department. An order has been made by that court dated June 19, 1944, in connection with the motion for a stay on appeal, granting the stay upon condition that the appeal be perfected and be ready for argument for the October Term, commencing September 25, 1944.'

3. The Occupancy Tax, referred to in paragraph 10 of the Unger affidavit, was levied by the City of New York for the freight business, conducted from the office at 350 Madison Avenue, Borough of Manhattan, and the said tax was paid from the office of the defendant at Green Bay, Wisconsin.

[fol. 45] 4. The annual report to the Securities and Exchange Commission is signed by the President, Mr. M. E. McGee in Green Bay, Wisconsin, and then signed by Mr. Cox, as Treasurer, in New York. In substance, the report sets forth the amount of securities which have been registered and the description of existing reports of any contracts between the corporation and its subsidiaries and directors. The report also called for the name and address of the person authorized to receive notices and communications from the Securities and Exchange Commission and, in the answer to that question, Mr. Cox's name was inserted with his address as 20 Exchange Place, New York, N. Y.

5. The annual reports to the stockholders of the defendant are prepared by the General Auditor in Green Bay, Wisconsin and submitted by him to Mr. Cox for signature.

6. The defendant's annual reports to the Interstate Commerce Commission, which are voluminous reports of operating data, consist of some 134 pages in printed form, are prepared in Green Bay, Wisconsin, by the General Auditor and are signed and sworn to in Green Bay, Wisconsin, by the President and the General Auditor. In addition thereto, at the bottom of the first page of said reports is the following: "Name of officer in charge of correspondence with the Commission regarding this report; L. P. Wohlfeil; official title—General Auditor; office address—Green Bay, Wisconsin.

7. Paragraph 13 of the Unger answering affidavit refers to an "Official Directory of Industries" which lists, among other officers, Edgar Palmer, Vice-President, with his office at 20 Exchange Place, New York, N. Y. It further states that since the death of Mr. Palmer, Mr. C. Ledyard Blair, of 1 Wall Street, New York, N. Y., has been elected Vice-President. Mr. Edgar Palmer was Chairman of the Board of New Jersey Zinc Company and devoted none of his time to any duties as Vice-President of the defendant. The sole [fol. 46] reason for election was to have available in the New York area, in case of emergency, someone who could sign stock certificates of the corporation in connection with transfers. After the death of Mr. Palmer, C. Ledyard Blair was elected a Vice-President, but he has never qualified by obtaining the consent of the Interstate Commerce Commission and he has never served in such capacity.

8. The answering affidavits referred to the Executive Committee of the defendant as consisting of C. Ledyard Blair, Charles W. Cox and H. E. McGee. It is true that these men have been appointed from year to year as members of the Executive Committee. However, no meeting of the Executive Committee has been held for the last twenty years.

Richard B. Wilson.

(Sworn to the 14th day of July, 1944.)

[fol. 47] IN UNITED STATES DISTRICT COURT

SUR-REPLY AFFIDAVIT OF LUDWIG MANDEL, READ IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

[Same title]

(Civil 26-194)

STATE OF NEW YORK,
County of New York, ss:

Ludwig Mandel, being duly sworn, deposes and says:

I am an attorney associated with Unger & Pollack, attorneys for the plaintiffs in this action.

The Class B Debentures of Green Bay and Western Railroad Company are listed on the New York Stock Exchange as bonds.

The reply affidavit of Richard B. Wilson admits that an Executive Committee, consisting of three members, two of whom are present in New York, has been appointed from year to year by the Board of Directors, but states that the Executive Committee has held no meetings for the last twenty years. The inescapable inference from these facts is that the Committee has been functioning informally throughout the years; otherwise the Board of Directors would not have indulged in the useless gesture of making annual appointments.

Ludwig Mandel.

(Sworn to the 24th day of July, 1944.)

[fol. 48] IN UNITED STATES DISTRICT COURT

OPINION OF CAFFEY, D. J.

[Same title]

(Civ. 26-194)

The defendant has made two motions. One is to set aside service of the summons and complaint on the ground that the defendant (a Wisconsin corporation) is not doing business in New York. The other is to dismiss the complaint because there is lack of jurisdiction of the subject matter, which concerns the internal affairs of the defendant.

The motions were the last item on the calendar at my recent sitting in the motion part. I was compelled to reserve decision in a considerable number of cases. So much attention was required on those having priority that time now is not available for extensive discussion in the instant case. I must content myself, therefore, with briefly indicating the reasons for my conclusions.

A suit against the defendant similar to this was brought in the Supreme Court, Kings County, New York, the short title of which is *Sperling* v. *McGee*. The attorneys for the plaintiffs in *Sperling* v. *McGee* do not represent the plaintiffs in the present case (originally brought in the Supreme Court, New York County, and removed to this court).

The identical question raised by the pending first motion was also raised in *Sperling* v. *McGee*. The latter was ruled against by Mr. Justice Garvin. His opinion was published

---

in the New York Law Journal of June 6, 1944, and a copy is annexed as Exhibit A to the affidavit herein of counsel for the plaintiffs verified July 12, 1944.

After study of all the papers bearing on the instant first motion, I concur in the substance of the findings of facts set out in the opinion of Mr. Justice Garvin. I concur also in his conclusion that the defendant "is present in the state"; that is, that in the sense of the applicable court decisions the defendant is and for some time past continuously has been doing business in New York (*Pomeroy* v. *Hocking Valley* [fol. 49] *Railway Co.*, 218 N. Y. 530, 533-536, and *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 266. Cf. *Frene* v. *Louisville Cement Co.*, Ct. App. D. C., 134 Fed. (2d) 511, 515-518).

The affidavits in this case add a good deal to the facts as summarized by Mr. Justice Garvin; but I do not think they materially alter the pertinent features of the situation as it stood when *Sperling* v. *McGee* was before him.

Section 229 of the New York Civil Practice Act prescribes how service in this State of a summons shall be made on a foreign corporation and designates those to whom a copy shall be delivered in order to effect the service. Among the individuals on whom subdivision 1 authorizes such service are an assistant treasurer and an assistant secretary of the corporation. Rule 4 (d) (3) and (7) provides that service on a foreign corporation shall be by delivering a copy of the summons and complaint, among others, to an officer "in the manner prescribed by the law of the state in which the service is made." In this case the service was made in that way in New York on an assistant treasurer, who was as well an assistant secretary, of the defendant.

In my view the service was good (*Eddy* v. *Lafayette*, 163 U. S. 456, 464. Cf. *Jacobowitz* v. *Thomson*, 2 Cir., 141 Fed. (2d) 72, 74-6). In consequence I think the first motion should be denied.

We turn now to the question whether there is, or should be exercised, jurisdiction of the subject matter.

The defendant has issued and there are outstanding (1) Common Stock, (2) Class A Debentures and (3) Class B Debentures. The holders of the first and second are entitled to payment of annual installments of 5% on their face prior to any payments to holders of the third.

As the plaintiffs assert, in the complaint (paragraph 6), by the terms of the defendant's articles of incorporation

and of the Class B Debentures, the holders thereof are entitled "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A [fol. 50] debentures and the said stock." In addition the complaint (paragraph 6) alleges that the articles of incorporation provide that "Such surplus net earnings, if any, to be paid to and distributed among the holders of Class B Debentures pro rata and the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

In the complaint it is also alleged (paragraph 10) that between 1924 and 1943 the sum of $155,000 was required to be paid to the holders of the capital stock and Class A Debentures; further that the aggregate of such net earnings, "after deducting reserves for additions, general improvements and depreciation, and after deducting said sum of $155,000 in each of said years," was approximately $1,649,000; and further (paragraph 11) that during the whole of such period the total payment to the holders of the stock and the Class B Debentures was approximately $840,000, thus leaving $809,000 (accumulated and held in surplus account) to which the plaintiffs allege (paragraph 14) such holders are entitled and for which, in behalf of all the holders, the plaintiffs sue.

In other words, among other things, the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.

It seems to me manifest that the law-suit is a litigation which inevitably and necessarily involves the internal affairs of the defendant.

Moreover, all the physical properties of the defendant which are operated and from which it derives earnings are located in Wisconsin, the state of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept.

If I be right in thinking that the pending action hinges around and must turn on the internal affairs of the [fol. 51] defendant, then this court is authorized to decline

to retain jurisdiction of it (*Rogers* v. *Guaranty Trust Co.*, 282 U. S. 123, 130-1, and *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105. Cf. *Cohn* v. *American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, 113).

If I be right as to internal affairs of the defendant being involved in the present suit, then it is within the discretion of this court to dismiss it. I think that it should be dismissed, without prejudice to its being renewed in Wisconsin.

I rest the position stated on two grounds: (1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin. (2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant.

I feel, therefore, that the second motion should be granted.

On the other hand, if my second ruling be erroneous, there will be a compensating advantage in the course I have adopted. This is that prior to going on with what is likely to be an extensive proceeding, at slight expense, an authoritative holding can be obtained from an appellate court with respect to whether I am wrong.

On two days' notice settle order accordingly with respect to both motions.

Dated, August 1, 1944.

Francis G. Caffey, United States District Judge.

[fol. 52] In United States District Court

Order and Judgment Appealed From

[Same Title]

(Civil 26-194.)

The defendant having moved by notice of motion dated June 19, 1944, as amended by stipulation between the parties dated July 18, 1944, (1) to set aside the service of the summons and complaint herein and dismiss said complaint

on the ground that the defendant, a foreign corporation, is not doing business within the State of New York and therefore that the Court lacks jurisdiction over the person of the defendant, and (2) to dismiss said complaint on the ground that there is a lack of jurisdiction of the subject-matter of the action in that the subject-matter is concerned with the internal affairs of the defendant, a foreign corporation, and said motions having come on to be heard before this Court on July 18, 1944,

Now, upon reading and filing the said notice of motion dated June 19, 1944, the stipulation between the parties amending the same dated July 18, 1944, the transcript of the record of the above entitled action (begun in the Supreme Court of the State of New York, New York County, and removed therefrom to this Court) filed in this Court June 15, 1944, the affidavits of Richard B. Wilson sworn to the 17th day of June, 1944 and the 14th day of July, 1944, respectively, and the affidavit of John A. Moore, sworn to the 16th day of June, 1944, all in support of said motions, and the affidavit of William F. Unger sworn to July 12, 1944, and the affidavits of Ludwig Mandel, sworn to July 12, 1944 and July 24, 1944, respectively, all in opposition to said motions and after hearing Cadwalader, Wickersham & Taft (Walter Bruchhausen, of counsel), in support of said motions, and after hearing Unger & Pollack (William F. Unger, of counsel) in opposition to said motions, and the Court having filed a written opinion dated August 1, 1944, it is

Ordered, that the said motion to set aside the service of the summons and complaint and to dismiss said com- [fol. 53] plaint on the ground that the defendant, a foreign corporation, is not doing business within the State of New York and that the Court lacks jurisdiction over the person of the defendant, be and the same is hereby in all respects denied, and it is

Further Ordered and Adjudged that the said motion to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject-matter of the action in that the subject-matter is concerned with the internal affairs of the defendant, a foreign corporation, be and the same is hereby in all respects granted, and that said complaint be and the same is hereby dismissed, without prejudice however to the said plaintiffs to institute a like or similar action

in the State of Wisconsin, which is the state of incorporation of the defendant.

Dated, New York, N. Y., August 9th, 1944.

Approved: Simon H. Rifkind, United States District Judge.

Judgment Rendered, George J. H. Follmer, Clerk.

August 9, 1944.

[fol. 54] In United States District Court

Notice of Appeal

[Same Title]

(Civil 26-194.)

Sirs:

Notice Is Hereby Given that the plaintiffs above named hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from so much of the order and judgment entered in this action on August 9, 1944, as granted defendant's motion to dismiss the complaint on the ground that there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of a foreign corporation, and from so much of said order and judgment as dismissed the complaint.

Dated, New York, August 31st, 1944.

Yours, etc., Unger & Pollack, Attorneys for Plaintiffs, Office & P. O. Address: 111 Broadway, New York, N. Y.

To: Cadwalader, Wickersham & Taft, Esqs., Attorneys for Defendant, Appearing Specially, 14 Wall Street, New York, N. Y.; George J. H. Follmer, Esq., Clerk of the Court.

[fol. 55] IN UNITED STATES DISTRICT COURT

STIPULATION DESIGNATING CONTENTS OF RECORD

(Pursuant to Rule 75[f])

[Same Title]

It Is Hereby Stipulated and Agreed by and between the undersigned that, pursuant to Rule 75 (f) of the Federal Rules of Civil Procedure, there shall be included in the record on appeal herein only the following:

1. Statement pursuant to Rule 13.
2. Complaint.
3. Defendant's notice of motion dated June 19, 1944 to dismiss the complaint on the ground that there is a lack of jurisdiction over the person.
4. Stipulation dated July 18, 1944 amending defendant's notice of motion to add the further ground that there is a lack of jurisdiction of the subject matter of the action.
5. Supporting affidavit of Richard B. Wilson, sworn to June 17, 1944.
6. Supporting affidavit of John A. Moore, sworn to June 16, 1944.
7. Opposing affidavit of William F. Unger, sworn to July 12, 1944.
8. Opposing affidavit of Ludwig Mandel, sworn to July 12, 1944.
9. Reply affidavit of Richard B. Wilson, sworn to July 14, 1944.
10. Reply affidavit of Ludwig Mandel, sworn to July 24, 1944.
11. Opinion of Caffey, D. J., dated August 1, 1944.
12. Order and judgment appealed from, dated August 9, 1944.

[fol. 56] 13. Notice of appeal dated August 31, 1944 and filed September 1, 1944.

14. This stipulation.
15. Stipulation as to record.
16. Clerk's certificate.

It Is Further Stipulated and Agreed that the plaintiffs-appellants need not serve a statement of the points on which

they intend to rely on this appeal as required by Rule 75 (d) of the Federal Rules of Civil Procedure.

Dated, New York, September 5, 1944.

Unger & Pollack, Attorneys for Plaintiffs-Appellants. Cadwalader, Wickersham & Taft, Attorneys for Defendant-Appellee.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

[Same Title]

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of this Court in the above entitled matter as agreed on by the parties.

Dated: New York, October 14th, 1944.

Unger & Pollack, Attorneys for Plaintiffs-Appellants. Cadwalader, Wickersham & Taft, Attorneys for Defendant-Appellee.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 207

(Argued January 12, 1945. Decided February 9, 1945)

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

vs.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Before: Chase, Hutcheson and Frank, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York. Affirmed.

Unger & Pollack (Milton Pollack and Ludwig Maindel, *of counsel*) for Appellants. Cadwalader, Wickersham & Taft (Merrill M. Manning and Walter Bruchhausen, *of counsel*) for Appellee.

[fol. 59] HUTCHESON, *Circuit Judge*:

Brought by appellants on behalf of themselves and other holders of Class B debentures[1] against appellee, a corpora-

[1] This is the form of the debenture sued on:

United States of America
Green Bay and Western Railroad Company
State of Wisconsin.
$1000. Class B Debenture No. —

The Green Bay & Western Railroad Company hereby certifies that this is one of a series of Seven thousand of its Class B Debentures in the sum of One Thousand Dollars each, aggregating in all the sum of Seven Million Dollars, which sum of One Thousand Dollars will be payable to the bearer hereof, or if registered, to the person appearing on the books of the said Company as the last registered owner hereof, only in the event of a sale or reorganization of the

[fol. 60] tion organized and existing under the laws of Wisconsin, the suit sought judgment for $809,618.85 alleged to belong to the holders of the debentures as their share of the undistributed and withheld net earnings of defendant for the years 1924 to 1943, inclusive. It was alleged that the debentures constituted a fixed and binding contract for the appropriation and payment to the holders, of the net earnings; that the provision [2] requiring action by the directors was a mere formality; that during the years in question the [fol. 61] net earnings applicable to Class B debentures had aggregated $1,649,618.15; that though in each year except the years 1932, 1933 and 1934, the defendant had distributed part of the applicable net earnings in the aggregate sum of $840,000.00, it had in each year withheld portions thereof and passed them to surplus; and that such sums, so wrongfuliy passed to surplus instead of being paid on the debentures; now aggregated the sum for which plaintiffs sued.

Railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens and charges upon such railroad or property, and after payment of Six hundred thousand Dollars to the holders of a series of debentures known as Class A, issued or to be issued by said Company, and the sum of Two Million, five hundred thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures. The said Railroad Company Hereby Covenants and Agrees that no mortgage shall at any time be placed upon its railroad and other property, nor shall the same be leased or sold without the consent of the holders of seventy five per cent of the capital stock outstanding at the time of such mortgage lease or sale. The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of

---

[2] "The amounts, if any, payable upon the debentures out of the net earnings in any year will be fixed and declared by the Board of Directors on or before the first day of February in the following year, and when so declared any amount payable will be paid at the office or agency of the company in New York on or before the first day of March in each year to the holder of the debentures."

The defendant met the suit with two motions to dismiss. In one of them, the ground taken was lack of jurisdiction over the person of the defendant for want of proper service on it. In the other it was that, in the exercise of a sound discretion, jurisdiction of the action should not be assumed because its subject matter was concerned with the internal affairs of a corporation foreign to the state of suit.

Affidavits and counter affidavits having been filed and heard on the motions, the district judge, holding that the defendant was present in the district and was properly served, denied the first motion. Of the opinion though that the suit concerned the internal affairs of the defendant corporation and could be better tried in Wisconsin, the state of its incorporation, the district judge, on the authority of *Rogers* v. *Guaranty Trust Co.*, 282 U. S. 123; *Cohn* v. *Mishkoff*, 256 N. Y. 102, *Cohn* v. *American Window Glass Co.*, 126 F. (2) 111, exercised his discretion to dismiss the suit without prejudice to its being renewed in Wisconsin.

Appellants are here insisting that the doctrine of *forum non conveniens*, on which the dismissal was based, was not properly applied, that discretion was abused in dismissing the suit, and, because it was, the judgment must be reversed. We do not think so.

---

interest thereon participate in the distribution of annual net income to the following extent, viz.,—so much of the annual net earnings of the said Company in any years as would be applicable to the payment of dividends on stock shall be applied as follows, viz.,—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ percent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures

If we could agree with appellants' assumption that the suit involved nothing except a claim upon a liquidated de- [fol. 62] mand, that in short the contract of the Class B debentures operated of itself to set apart and appropriate each year to those debentures the specific sums plaintiffs sue for, and that the fixing and declaration of the amounts by the Directors was a mere formality, we should agree that jurisdiction ought not to have been declined. But we think it clear that this is an over-simplified view of what the debentures intended to, and did, provide. The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for

---

pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid at the office or agency of the Company in the City of New York on or before the first day of March, in such year to the holder of this debenture, upon its production at such office or agency in order that such payment may be stamped hereon; or, if registered, payment will be made by check mailed to the person appearing on the books of this company as the registered owner hereof at the last address furnished by him to this company. This debenture shall pass by delivery unless registered on the books of the Company at its office or agency in the City of New York, and when so registered, and registry noted hereon, title thereto shall pass only by assignment executed by the last registered owner and noted on such register. This instrument shall not be valid for any purpose unless authenticated by the signature of the Farmers' Loan and Trust Company to the certificate endorsed hereon.

the view that the provision in the debentures, that the sums, if any, due were to be fixed and declared by the directors, meant just that, the long practise in accordance therewith and the long acquiescence of the debenture holders in that practise would provide it. The question before us is not one of jurisdiction but one of the exercise of judgment as to which would be the most convenient forum. In the circumstances this case provides, it seems quite clear to us that in declining jurisdiction and remitting the parties to that of Wisconsin, where both corporation and directors can be sued and all matters governing the rights of the corporation and the holders of its securities can be determined under the laws of that state, the court used, it did not abuse, its discretion. Its order dismissing the action without prejudice to the right to renew it in Wisconsin is accordingly Affirmed.

[fol. 63] FRANK, *Circuit Judge*, dissenting:

1. To explain my reasons for dissenting, it is first necessary to state some of the facts more fully than they are stated in the majority opinion.

The debentures provide: "After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and *any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata.*"[1]

It is undisputed that the amount required annually for the preferential payment to holders of defendant's stock and Class A Debentures aggregated $155,000 (i.e., $125,000 for the stock and $30,000 for the Class A Debentures). In each of the years 1924 to 1943 inclusive, excepting 1932-1934, defendant, after paying this $155,000, had additional net earnings which aggregated $1,643,618.85. In those years, out of such additional net earnings, defendant paid to the

[1] Emphasis added.

Class B Debentures only $840,000, leaving an unpaid balance of $809,618.85. The figures, in detail for each of those years, are not at all in doubt; they appear in exhibits B and C at-
[fol. 64] tached to plaintiffs' complaint which I set forth in a footnote.[2]

I see no basis for any suggestion that the directors are given any discretion in fixing the amount to be paid. The instrument expressly provides that it is to be computed by

---

2 Exhibit "B" attached to complaint:

Year	Net Earnings (after deducting reserves for additions, general improvements and depreciation)	Paid on Capital Stock	Paid on Class A Debentures	Net Earnings payable on Class B Debentures
1924	$ 197,883.57	$ 125,000.00	$ 30,000.00	$ 42,883.57
1925	194,964.16	125,000.00	30,000.00	39,964.16
1926	192,795.67	125,000.00	30,000.00	37,795.67
1927	219,592.97	125,000.00	30,000.00	64,592.97
1928	229,278.75	125,000.00	30,000.00	74,278.75
1929	235,211.65	125,000.00	30,000.00	80,211.65
1930	245,491.57	125,000.00	30,000.00	90,491.57
1931	180,482.28	125,000.00	30,000.00	25,482.28
1935	171,161.66	125,000.00	30,000.00	16,161.66
1936	242,763.66	125,000.00	30,000.00	87,763.66
1937	308,110.51	125,000.00	30,000.00	153,110.51
1938	173,017.64	125,000.00	30,000.00	18,017.64
1939	243,505.48	125,000.00	30,000.00	88,505.48
1940	253,497.69	125,000.00	30,000.00	98,497.69
1941	301,165.54	125,000.00	30,000.00	146,165.54
1942	304,250.05	125,000.00	30,000.00	149,250.05
1943	591,446.00	125,000.00	30,000.00	436,446.00
Totals	$4,284,618.85	$2,125,000.00	$510,000.00	$1,649,618.85

Exhibit "C" attached to complaint:

Year	Net Earnings payable on Class B Debentures	Amounts Actually Paid on Class B Debentures	Net Earnings Withheld
1924	$ 42,883.57	$ 35,000.00	$ 7,883.57
1925	39,964.16	35,000.00	4,964.16
1926	37,795.67	35,000.00	2,795.67
1927	64,592.97	35,000.00	29,592.97
1928	74,278.75	70,000.00	4,278.75
1929	80,211.65	70,000.00	10,211.65
1930	90,491.57	70,000.00	20,491.57
1931	25,482.28		25,482.28
1935	16,161.66		16,161.66
1936	87,763.66	70,000.00	17,763.66
1937	153,110.51	105,000.00	48,110.51
1938	18,017.64		18,017.64
1939	88,505.48	35,000.00	53,505.48
1940	98,497.69	35,000.00	63,497.69
1941	146,165.54	70,000.00	76,165.54
1942	149,250.05	70,000.00	79,250.05
1943	436,446.00	105,000.00	331,446.00
Totals	$1,649,618.85	$840,000.00	$809,618.85

deducting from the net income the amount paid on the capital stock and the amount paid on the Class A Debentures. The resulting sum is to be paid to the Class B Debenture-holders. Nor are the directors given any discretion as to whether or not that sum is to be paid to the Class B Debenture-holders. The instrument declares that "the *amount payable will be* fixed and *declared* by the Board of Directors." Under such a provision, a resolution by the directors would be purely ministerial. Cf. *Crocker* v. *Waltham Watch Co.*, 300 Mass. 397, 53 N. E. (2d) 230; *Wood* v. *Larry*, [fol. 65] 47 Hun 550 (app. dismissed 124 N. Y. 83); *Burke* v. *Ottawa Gas & Electric Co.*, 87 Kans. 6. The obligation of defendant to make payment of the amounts withheld is therefore, I think, complete without any resolution.

My colleagues, however, make this suggestion: Plaintiffs are here suing for monies alleged by them to have been improperly withheld in the years 1924 to 1943 inclusive; since this suit was not brought until 1944, the plaintiffs have "by long acquiescence" accepted as correct an interpretation of the debenture provision which precludes payments not expressly declared by the directors to be due, i.e., makes a directors' resolution an indispensable condition precedent. Since here there is not (and my colleagues do not even intimate that there is) such delay as to bar the suit because of the statute of limitations or laches, my colleagues' suggestion comes to this: One who does not promptly sue on a written instrument must be presumed to have acquiesced in [fol. 66] an interpretation of it unfavorable to him. I know of no authorities to sustain that position, and my colleagues cite none.

2. It follows, I think, that the doctrine of *forum non conveniens* has no proper application here.[3] For, in the circumstances, decision will involve no interference with the corporation's internal affairs. We said in *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, 113 (C. C. A. 2) that the ruling in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 183, had been much weakened; and the facts here surely

[3] See Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867 (1935); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929); Foster, *Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217 (1930); 44 Harv. L. Rev. 41 (1930).

are far less strong than in the *Rogers* case,[4] for here the contractual duty of the defendant depends solely on a mathematical computation easily made.

Accordingly, the case boils down to one in which the need for examination of Wisconsin "law" is the only ground for sending the action to Wisconsin for trial. In other words, my colleagues are saying, in effect, that whenever a question of conflict of laws arises, a trial court has discretion to reject jurisdiction. I think that such rejection constitutes abuse of discretion. Especially is that true here where the plaintiff is a resident of New York; five of the defendant's six directors have their place of business in New York (at least two residing there and two in the adjoining state of New Jersey); two of the three members of the defendant's Executive Committee (which is authorized to do all acts that the Board of Directors may do during intervals between directors' meetings) have their place of business in [fol. 67] New York; and defendant's vice-president, its secretary-treasurer and its assistant secretary-treasurer have their offices in New York.

It seems to me that the doctrine applied here by my colleagues might well be called "*forum inconveniens.*"

3. There remains this argument, aside from the doctrine of *forum non conveniens:* The directors have failed to act, and, as they are not parties to the suit, the court cannot compel them to act. I cannot agree that that argument is apposite here. As already noted, on the facts, since the directors lack all discretion, their action would be purely ministerial. In such circumstances, their presence in court and a court order directing them to act would be the sheerest formalities. Certainly in a court of equity such action by the directors should not be a condition precedent to the corporation's liability. For equity considers that done which ought to be done and disregards formalities. These maxims have been frequently applied in a variety of cir-

---

[4] Or the *Cohen* case which was stronger than the *Rogers* case. The *Cohen* case, as we there stated, involved almost the most "complete interference with the internal affairs of a foreign corporation" imaginable.

cumstances when dispensing with mere ministerial acts.[5] And even in actions "at law," conditions precedent of that character are disregarded on grounds of fairness.[6]

[fol. 68] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Your petitioners, Bertram Williams, Max Brasch and Heinz Mottek, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, respectfully petition this Court to grant a rehearing on the merits of its decision affirming (by a divided Court) the order of the District Court for the Southern District of New York which dismissed the complaint without prejudice to the commencement of an action in Wisconsin, on the ground that the subject matter of the action involved interference with the internal affairs of a

---

[5] See, e.g., *Theater Realty Co.* v. *Aronberg-Fried Co.*, 85 F. (2d) 383, 387 (C. C. A. 8); *In re Greenberg*, 271 Fed. 258, 259 (C. C. A. 2); *Mutual Life Ins. Co.* v. *Corodemos*, 7 Fed. Supp. 349, 351; *White* v. *White*, 194 N. Y. Supp. 114, 117; *Farley* v. *U. S.*, 291 Fed. 238, 241; 30 C. J. S. §§ 106 and 107.

[6] Williston, *Contracts* (Rev. ed. 1938) § 806 (pp. 2262-2263); cf. § 615 (pp. 2312-2313); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. (2d) 978, 990-991 (C. C. A. 2); *Restatement of Contracts*, § 265; *Adamson* v. *Alexander Milburn Co.*, 275 Fed. 148 (C. C. A. 2); *Friede* v. *White Co.*, 244 Fed. 272, 274; 17 C. J. S. § 1009.

foreign corporation (*forum non conveniens*). The ground upon which rehearing is sought is as follows:

[fol. 69] The majority of the Court based their decision on the holding, seemingly erroneous, that the defendant's directors were available for the service of process in Wisconsin where, in the opinion of Judge Hutcheson it is stated, "both corporation and directors can be sued".

Corporate action by the directors is required herein according to the holding of the majority of the Court. It seems manifest error to invoke the doctrine of *forum non conveniens* to make it impossible for a plaintiff to sue in the only district in which he can obtain jurisdiction over the alleged necessary parties, i. e., both the corporation and the directors.

The undisputed facts in this record indicate that the directors cannot be reached with process in Wisconsin but are amenable to process only in New York, where five of the defendant's six directors reside or have their places of business and where directors' meetings are regularly and customarily held. Joinder of the directors as parties can be effected only in New York.

Wherefore, your petitioners respectfully pray this Court to grant a rehearing to the end that it may redress what, it is respectfully submitted, is error committed by it.

Bertram Williams, Max Brasch and Heinz Mottek,
By Unger & Pollack, Milton Pollack, A Member
of the Firm, Attorneys and Counsel.

Milton Pollack, Ludwig Mandel, Of Counsel.
Dated: New York, February 19, 1945.

[fol. 70] Certificate of Counsel

I, Milton Pollack, a member of the firm of Unger & Pollack, counsel for petitioners, do hereby certify that in my judgment the foregoing petition for rehearing is well founded in law and in fact and that the same is not interposed for the purpose of delay.

Milton Pollack.

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Plaintiffs-Appellants,

against

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Before Chase, Hutcheson and Frank, Circuit Judges

Unger & Pollack, for Petitioner; Milton Pollack and Ludwig Mandel, of Counsel.

Per Curiam:

Petition for rehearing denied.

H. B. C., J. C. H., Jr., C. J. J.

Filed March 5, 1945.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of March one thousand nine hundred and forty-five.

Present: Hon. Harrie B. Chase, Hon. Joseph C. Hutcheson, Jr., Hon. Jerome N. Frank, Circuit Judges.

BERTRAM WILLIAMS, etc., et al., Plaintiffs-Appellants,

v.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Bertram Williams, etc., et al., Plain-

tiffs-Appellants, v. Green Bay and Western Railroad Company, Defendant-Appellee. Order. United States Circuit Court of Appeals, Second Circuit. Filed March 5th, 1945. Alexander M. Bell, Clerk.

[fol. 74] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of March one thousand nine hundred and forty-five.

Present: Hon. Harrie B. Chase, Hon. Joseph C. Hutcheson, Jr., Hon. Jerome N. Frank, Circuit Judges.

BERTRAM WILLIAMS, etc., et al., Plaintiffs-Appellants,

v.

GREEN BAY AND WESTERN RAILROAD COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 75] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Bertram Williams, etc., et al., Plaintiffs-Appellants, v. Green Bay and Western Railroad Company, Defendant-Appellee. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed March 6, 1945. Alexander M. Bell, Clerk.

[fol. 76] Clerk's Certificate to foregoing transcript omitted in printing.

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on Cover: Enter Milton Pollack. File No. 49,788. U. S. Circuit Court of Appeals, Second Circuit. Term No. 100. Bertram Williams, Max Brasch and Heinz Mottek, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company, Petitioners, vs. Green Bay and Western Railroad Company. Petition for a writ of certiorari and exhibit thereto. Filed May 31, 1945. Term No. 100, O. T. 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 335 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MILTON POLLACK,
Counsel for Petitioners.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

C. TABLE OF CASES

PAGES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed the judgment entered August 9, 1944, by the United States District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 6, 1945 (R. 69), after denial of a petition for rehearing (R. 68). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF FACTS.

This action was instituted in the United States District Court for the Southern District of New York by three residents of New York, on behalf of themselves and all other holders of Class B debentures issued by the defendant, to recover amounts due in lieu of interest on the debentures and payable out of earnings of the defendant, a Wisconsin railroad corporation. A specimen copy of the debentures is annexed to the complaint (R. 8), and portions thereof are quoted in the dissenting opinion of Circuit Judge Frank (R. 62).

The District Court denied defendant's motion to dismiss the complaint based on the claim by defendant that the Court had no jurisdiction over the person (R. 53) and held that the defendant was present and "doing business" within the State of New York (R. 48). At the same time, however, the District Court dismissed the complaint, without prejudice to the institution of a similar suit in Wisconsin, on the ground that "there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation" (R. 53). The Circuit Court affirmed, one judge dissenting.

The debentures had their inception as valid obligations in the State of New York and in the district in which this action was brought (R. 9, 27). The debentures are listed and traded in as bonds on the New York Stock Exchange (R. 47). They are transferable on the books of the defendant only in New York (R. 9). All amounts due on these debentures in lieu of interest are expressly made payable in New York (R. 9) and such amounts as were in fact paid by defendant were admittedly paid from New York (R. 18). The defendant maintains its financial as well as another office in New York (R. 18, 19) and maintains a bank account in New York, not only for the purpose of meeting obligations of the very character which the petitioners seek to

enforce in this action but also for its "excess of operating funds" not needed in Wisconsin (R. 19).

Five of defendant's six directors are to be found in New York and can not be found for service of process in Wisconsin (R. 29, 35). These directors include all executive and fiscal officers, other than the President who is the sixth director and actually operates the railroad from Wisconsin (R. 36). In New York are to be found two of the three members of defendant's Executive Committee, which is appointed from year to year and is authorized to act for the Board of Directors during intervals between meetings (R. 29, 35, 46).

Directors' meetings are customarily held in New York City, and defendant—though relying successfully thus far on the doctrine of *forum non conveniens*—admits that such meetings have been held in New York "for the convenience of Directors" (R. 19). In New York are kept defendant's financial records, its transfer books, its minutes of directors' meetings, its seal and other corporate records (R. 17, 18, 35).

Reports filed with the Securities and Exchange Commission by defendant are customarily signed and sealed in New York (R. 35) and the person authorized to receive notices from the Commission is stated to have a New York address (R. 34).

Finally, of the 30 largest stockholders of the defendant owning an aggregate of 20,633 shares of stock out of a total of 25,000 shares outstanding, all but four are listed in reports filed by defendant with the Interstate Commerce Commission as having New York addresses (R. 37).

The complaint in this action (R. 3-12) is framed on the theory that the debentures issued by the defendant constituted a contract between the company and debenture holders requiring the company to pay "in lieu of interest" certain described amounts out of annual net earnings, generally to be characterized as the free surplus after reserves set up by the company, and the liability to pay is unaffected by any

exercise of discretion on the part of the defendant or its board of directors (R. 4, 5). Defendant concedes that "the single cause of action alleged in the complaint" proceeds on a "construction of the provisions of the certificate of incorporation and the Class B Debentures of the defendant" as would require the defendant to pay the amounts claimed by plaintiffs "without the exercise of discretion by the directors" (R. 16). Plaintiffs have not joined the directors as parties to this action because under their construction of the contract and under the theory of their complaint in this action no relief is required as against them. The action taken by the directors in the past, such as setting aside out of annual earnings reserves for additions, general improvements and depreciation, is not disputed by the plaintiffs but is in fact adopted as a basis for their computation of the amounts now due them (R. 5). It is the free surplus remaining after such reserves which plaintiffs claim under their contract.

In their complaint, the plaintiffs allege that in each of the years 1924 to 1943 (excepting the years 1932, 1933 and 1934), the defendant had substantial net earnings in excess of the $155,000 required in each of said years to satisfy preferential payments due to holders of defendant's stock and Class A debentures, and that after additionally deducting amounts charged against earnings in each of such years for additions, general improvements and depreciation, the aggregate amount of such net earnings was $1,649,618.85 (R. 5, 11), of which amount the sum of $809,618.85 has been improperly withheld from the Class B debenture holders since 1924 and accumulated in defendant's surplus account (R. 6, 12). Judgment directing distribution of said sum pro rata among the Class B debenture holders is requested (R. 19).

Plaintiffs' position is that the language used in defendant's articles of incorporation and the debentures is such that the right granted to the Class B debenture holders is an absolute and unconditional contractual right "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per

cent upon the said Class A Debentures and the said stock." (R. 4). As Judge Frank expressed it in his dissenting opinion in the Court below, there is no "basis for any suggestion that the directors are given any discretion in fixing the amount to be paid" (R. 63).

Accordingly, plaintiffs' position is that (1) the "internal affairs" of the defendant corporation are not involved; and (2) assuming without conceding that they are so involved, a proper application of the doctrine of *forum non conveniens* does not justify declining jurisdiction in the forum selected by the plaintiffs.

QUESTIONS PRESENTED.

1. Does the cause of action set forth in the complaint involve interference with the "internal affairs" of a foreign corporation?

2. Assuming that interference with defendant's "internal affairs" is involved, was the doctrine of *forum non conveniens* properly invoked to decline jurisdiction of the suit in New York under the facts in this case, or was the forum selected by the plaintiffs an "appropriate forum" within the decision in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123?

REASONS FOR GRANTING THE WRIT.

1. An important question involving the exercise of jurisdiction by federal district courts is involved. More specifically there is involved here a question as to the extent to which and under what circumstances the doctrine of *forum non conveniens* may be invoked to defeat the jurisdiction of a federal district court sitting in a district in which the

corporation is present and doing business. Particularly, where the only forum within which personally to reach the directors with process is the district where suit was brought. The weight to be given to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, as a precedent appears to be the subject of considerable doubt among the judges in the lower federal courts. Though cited by the majority in the court below to sustain their decision, the *Rogers* case is similarly relied upon in the dissenting opinion. The District Judge cited the *Rogers* case in support of his decision dismissing the complaint. In *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, Judge Clark of the Second Circuit alluded to the fact that there were dissents by three of the judges of this Court in the *Rogers* case, and he suggested that on its facts that decision might no longer be followed. A similar statement was made by Judge Mahoney of the First Circuit in *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76.

2. The doctrine of *forum non conveniens*, a doctrine essentially rooted in principles of justice and convenience, has been so misapplied in this case as to evoke the comment in the dissenting opinion in the court below that "the doctrine applied here * * * might well be called '*forum inconveniens*'" (R. 65). Assuming the applicability of this doctrine to the facts of this case and accepting, *arguendo*, the reasoning of the majority in the court below to the effect that both the corporation and its directors are necessary parties, rejection of jurisdiction in the only district in which the directors are amenable to process results in a palpable denial of any competent forum and in manifest injustice to the plaintiffs in this action. To permit the decision of the court below to remain as a precedent can lead only to further confusion and possibly greater injustice.

3. The holding by the court below appears to be in conflict with the decisions of the New York courts, which have not hesitated to construe the charters and obligations of

foreign railroad corporations towards their preferred stockholders (*Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157; *Prouty* v. *Michigan S. & N. Indiana R.R. Co.*, 1 Hun 655), and to income bondholders (*Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163; *Day* v. *Ogdensburgh & Lake Champlain R.R. Co.*, 107 N. Y. 129).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: May 25th, 1945.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railway Company,

Petitioners.

By MILTON POLLACK,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The grounds upon which the jurisdiction of this Court is invoked, a statement of the facts involved and the questions presented appear in the accompanying petition and, for the sake of brevity, are not here repeated.

OPINIONS BELOW.

The opinions of the Circuit Court of Appeals (R. 58-66) are reported in 147 F. (2d) 777. The opinion of the District Court (R. 48-51) is reported in 59 F. Supp. 98.

POINT I.

THE COURT BELOW ERRED IN HOLDING THAT INTERFERENCE WITH THE "INTERNAL AFFAIRS" OF A FOREIGN CORPORATION IS INVOLVED IN THIS SUIT.

The courts below have declined to exercise an admitted jurisdiction because they were of opinion that this suit involves interference with the "internal affairs" of a foreign corporation within the doctrine of *forum non conveniens*.

The district court apparently concluded that "internal affairs" were involved because, as it stated, "the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures" (R. 50). It did not stop to construe the contract sued upon. If thought that the plaintiffs' construction "necessarily involves the internal affairs of the defendant" (R. 50), though, as pointed out by Judge Frank in his dissenting opinion, "the contractual duty of the defendant depends solely on a mathematical computation easily made" (R. 65). Obviously, the mere fact that Wisconsin law might be involved did not justify the rejection of jurisdiction, for if that were true then whenever a question of conflict of laws arises a trial court could reject

jurisdiction. The New York courts have not hesitated to construe the charters and obligations of foreign railroad corporations in similar situations. (Cf. *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 176; *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, 178; *Day* v. *Ogdensburgh & Lake Champlain R. R. Co.*, 107 N. Y. 129, 141; *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1 Hun 655.) Nor would the fact that the Wisconsin courts had not passed upon the precise point be a ground for declining jurisdiction. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said at page 237:

> "Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Unlike the district court, the Circuit Court did construe the debentures. Differing, however, with the construction placed upon them in the complaint, the majority were of opinion that "before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them" (R. 61). But even they agreed that "jurisdiction ought not to have been declined" if plaintiffs' construction of the debentures was correct (R. 61).

The majority in the court below failed to discuss the provisions in the articles of incorporation and the debentures upon which plaintiffs rely and which Judge Frank quoted in arriving at a contrary conclusion (R. 62). These are the provisions in the articles of incorporation stating that the B debentures are "to be entitled to receive in lieu of interest

thereon any net earnings of the railroad and property in each year remaining after payment of five percent upon the said Class A Debentures and the said stock", and "any such net proceeds remaining after such payments *to be* distributed pro rata to and among the holders of the said Class B Debentures" (R. 4)*, and in the debentures themselves reading as follows:

> "Any surplus net earnings arising in such year which may then remain *shall* be paid to and distributed among the holders of Class B Debentures pro rata" (R. 9, 62).*

These debentures were first issued in 1896. While present-day financing may run along different patterns, that surely is no reason for refusing to give effect to the plain language used by the defendant in placing these securities on the market. Similar language has frequently been construed to require mandatory payments of earnings involving no discretion on the part of directors, and the courts have not hesitated to invoke well settled principles of contract law to permit a recovery in such cases.

> *Crocker v. Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230;
> *Wood v. Lary*, 47 Hun 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338;
> *Burk v. Ottawa Gas & Electric Co.*, 87 Kans. 6, 123 P. 857.

The majority in the court below appear to have rested their holding upon the fact that the debentures, in addition to the foregoing provisions, also state that the amounts payable "*will* be fixed and declared by the Board of Directors" (R. 9)*. Obviously, the use of the declarative in this sentence does not weaken the preceding mandatory language. As pointed out by Judge Frank in his dissenting opinion, under such a provision a resolution by the directors would be purely min-

* Italics added.

isterial since the directors lack all discretion, and the obligation of the defendant to make payment of the amounts withheld is complete without any resolution (R. 64).

Since the contract sued upon contains an absolute and unqualified obligation on the part of the defendant to pay the amounts claimed in this suit—the accuracy of which amounts is undisputed—it seems clear to us, as it did to Judge Frank, that there is no interference with the "internal affairs" of the defendant and hence that there is no room for any application of the doctrine of *forum non conveniens*.

POINT II.

ASSUMING THAT THE DOCTRINE OF FORUM NON CONVENIENS HAS ANY APPLICATION, IT WAS AN ABUSE OF DISCRETION TO DECLINE JURISDICTION IN THIS CASE.

The district court, being of opinion that the "internal affairs" of defendant were involved, concluded that jurisdiction should be declined on two grounds, which it stated as follows (R. 51):

> "(1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin.
>
> "(2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant."

The undisputed facts in this record, summarized in the accompanying petition, are themselves the best answer to any claim that the defendant is being subjected to any undue burden by carrying on this litigation in New York. A place more convenient to the defendant than New York for the conduct of this litigation is hard to imagine.

Nor does it seem to us to be a proper application of the doctrine of *forum non conveniens* to decline jurisdiction because of the crowded calendars in the district chosen by plaintiffs. We do not believe that the condition of the calendar is a consideration determining the acceptance or rejection of jurisdiction. We understand the term "convenience" when used in connection with the doctrine of *forum non conveniens* to refer to the convenience of litigants rather than to the convenience of the court. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience."

In the court below the majority, proceeding on the assumption that the exercise of discretion by directors was involved, held that the district court did not abuse its discretion in declining jurisdiction and remitting the parties to that of Wisconsin, where, said the court, "both corporation and directors can be sued" (R. 62).

The assumption that the directors were amenable to process in Wisconsin finds no support in the record. The undisputed facts in this record indicate that the directors are to be found for service of process in New York, where five of defendant's six directors reside or have their places of business and where directors' meetings are—for the sake of their own convenience, as defendant itself states—customarily and regularly held (R. 19). If, as the court below has held, discretion is involved and corporate action by the directors is required, New York is the jurisdiction where the necessary parties are to be found. It seems manifest error then to invoke the doctrine of *forum non conveniens* to make it impossible for the plaintiffs to sue in the only district in which they can obtain jurisdiction over all necessary parties. Such a result moved Judge Frank in the court below to say in his dissenting opinion that the doctrine applied here by the majority might well be called "*forum inconveniens*" (R. 65).

Both the district court and the court below cited *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, in support of their rulings. But in the *Rogers* case this Court emphasized, in both the majority and minority opinions, that considerations of convenience and justice are paramount in the application of the doctrine of *forum non conveniens*. This Court there said:

> "But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case."

Although a very substantial interference with internal affairs was involved in the *Rogers* case, Chief Justice Stone and Justices Brandeis and Cardozo nevertheless dissented and were of opinion that on the facts presented jurisdiction should have been assumed. Since then, at least three federal court judges, including Judge Frank in his dissent in the court below (R. 64), have expressed doubts as to the weight to be given to the majority ruling in the *Rogers* case.*

The remaining two cases relied upon in the courts below are readily distinguishable. In *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, plaintiffs sought judgment requiring the corporation either to redeem its stock at par with interest or in the alternative to compel the defendant directors to declare a dividend allegedly withheld in bad faith, and thus the case involved a very real interference with internal affairs. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, the other case cited by the courts below, involved nullification of a corporate charter and such other extensive relief that Circuit Judge Clark was moved to say that he could "hardly imagine a more complete interference with the internal affairs of a foreign corporation."

---

* The other two are Judge Clark of the Second Circuit in *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, and Judge Mahoney of the First Circuit in *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76.

In the case at bar, no problem of administration is presented. The court is not asked to exercise its visitorial powers over a foreign corporation; it is not asked to interfere with the directors' discretion, for there is no discretion to be exercised. Nor is it an action in which a receiver is requested, or in which reclassification or redemption of stock or any similar far-reaching relief is sought.

There are present here no obstacles to the rendition of an effective decree. The federal court sitting in New York is in fact in a better position to enforce its decree than would be the branch of the federal court sitting in Wisconsin. The defendant has been found by the district court to be present in New York. With one exception, all of defendant's officers and directors are similarly to be found here. Its financial records are here. Funds for the purpose of meeting its obligations on these debentures are habitually kept here. What reasonable excuse can there be for permitting the defendant to escape the jurisdiction of the federal court in New York? Surely not the doctrine of *forum non conveniens*! That doctrine, as Mr. Justice Cardozo pointed out in the *Rogers* case, is "an instrument of justice" (p. 151). "The rule is intended to promote justice and not to furnish an avenue of escape for those who should answer somewhere for the wrongs charged against them" (*Overfield* v. *Pennroad Corporation*, 113 F. (2d) 6, 10).

We submit that every consideration of convenience, efficiency and justice points to New York, the forum selected by the plaintiffs, as the only "appropriate forum" within the holding in the *Rogers* case.

This Court in *Meredith* v. *Winter Haven*, 320 U. S. 228, indicated its concern with the failure of a federal district court to exercise its avowed diversity jurisdiction, in the absence of powerful considerations justifying non-exercise. It seems clear to us that the failure of the court in the case at bar to exercise its admitted jurisdiction was equally unjustified, and that such failure presents a situation requiring correction by this Court and the establishment of a salutary guide for the lower federal courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the accompanying petition for a writ of certiorari should be granted.

Dated: New York, May 25th, 1945.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

MILTON POLLACK,
LUDWIG MANDEL,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

MILTON POLLACK,
Counsel for Petitioners.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

Subject Matter.

Table of Cases.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 1335.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

I.

RESPONDENT HAS ABANDONED ANY PRETENSE THAT WISCONSIN IS MORE CONVENIENT THAN NEW YORK FOR THE TRIAL OF THIS SUIT.

Respondent has evidently abandoned any claim that Wisconsin is more convenient than New York for its directors for the trial of this suit. It does not deny that the directors are not amenable to process in Wisconsin. Instead we find the amazing statement in respondent's brief at page 8 that "Whether or not respondent's directors are amenable to process in Wisconsin is in no wise relevant," because the directors have not been joined as defendants.

This statement must be considered in the light of respondent's construction of the debentures themselves, which construction would make distribution of the surplus earnings "analogous to dividends" and dependent upon the exercise of discretion by respondent's directors (Respondent's brief, pp. 9-10). Indeed, this construction was the basis of the holding in the court below that jurisdiction had been properly declined by the district court (R. 61).

Respondent is therefore in the awkward position of urging that this suit is not maintainable because the directors are necessary parties, while at the same time insisting that the suit must be brought in that jurisdiction only where the directors are not amenable to process. Such an absurd result completely negates the considerations of justice and efficiency which lie at the base of the doctrine of *forum non conveniens*, the doctrine which respondent has invoked to defeat the jurisdiction selected by the plaintiffs.

II.

THE COURTS BELOW HAVE NOT HELD THAT THE STATE COURT IN WISCONSIN HAS EXCLUSIVE JURISDICTION.

It appears to us that respondent's brief gives the impression, no doubt unintentionally, that the district court, in declining jurisdiction, ruled that the *state* court of Wisconsin should decide the issues. Neither the district court nor the circuit court so held, as reference to the opinions will show (R. 48-51; 58-62). The original dismissal and its affirmance in the court below was solely on the basis of the doctrine of *forum non conveniens*. It left the petitioners free to commence a suit in either the state courts of Wisconsin or the federal courts sitting in that district. The quotations from *Pennsylvania* v. *Williams*, 294 U. S. 176, appearing at pages 2 and 5 of respondent's brief, are therefore not in point. In that case a Pennsylvania corporation was involved and the federal district court sitting in Pennsylvania relinquished its jurisdiction in favor of the Pennsylvania

state court because of the special circumstances there present. The doctrine of that case is not to be extended (Cf. *Meredith* v. *Winter Haven*, 320 U. S. 228), and certainly has no application here.

The question here is not whether the federal court sitting in Wisconsin rather than the Wisconsin state court should decide the issues in this case, but whether any court, state or federal, in Wisconsin is necessarily a more appropriate forum than the federal district court sitting in New York.

III.

NO QUESTIONS OF PUBLIC POLICY ARE INVOLVED IN CONSTRUING THE CONTRACT IN SUIT.

Respondent cites the case of *New York, etc., Railroad* v. *Nickals*, 119 U. S. 296, in its brief at page 10 in support of its argument that petitioners' construction of the debentures would so impair the ability of the defendant railroad to maintain its road as to make the contract void as against public policy. The cited case is clearly distinguishable.

In the *Nickals* case, the plaintiffs, preferred stockholders, claimed that the application of net profits from operations towards providing additions and improvements to the railroad was "a violation of rights secured to preferred stockholders" under their contract (p. 302). The court held that such expenditures were necessary and made "in good faith" (p. 308). Notwithstanding such a finding, the lower court held that the preferred stockholders had an absolute right to receive annual dividends of 6% out of annual net earnings before deducting expenditures for improvements and additions. This interpretation of the contract was held by this Court to be "an erroneous interpretation of both the agreement and the company's charter" (p. 304). Buttressing its position, the Court went on to say that a different view would "lead to results which sound policy would seem to forbid" in that it would prevent the railroad from fulfilling its duty "to maintain its track and cars in such condition as to ac-

commodate the public and provide for the safe transportation of passengers and freight" (p. 306).

Reference to Exhibit "B" attached to the complaint (R. 11) shows that there is no such problem involved in the present case. Plaintiffs do not seek to avoid any expenditures made by the company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and reasonably and in good faith to charge expenditures of this character against annual earnings is expressly recognized in Exhibit "B". Petitioners claim only such earnings as remain "after deducting reserves for additions, general improvements and depreciation" (R. 5), and thus any alleged violation of public policy in the *Nickals* case, *supra*, simply cannot exist here.

IV.

THE CASE OF THOMAS v. NEW YORK & GREENWOOD LAKE RY. CO. IS AUTHORITY FOR PETITIONER'S CONTENTIONS.

Respondent refers at page 9 of its brief to the case of *Thomas* v. *New York & Greenwood Lake Ry. Co.* (139 N. Y. 163), and states that the court there held "that the issue pertained to the discretion of the directors, an internal affair of the corporation." If this statement gives the impression that the complaint in that case was dismissed because the internal affairs of the corporation were involved, the quoted statement is misleading. That case involved a foreign railroad corporation. The New York court did not dismiss because internal affairs were involved. On the contrary, it considered at great length the provisions of the contract there sued upon by income bondholders, saying at page 180:

> "It remains to consider whether the complaint discloses any breach of the contract between the defendant corporation and the bondholders. Unless facts are stated showing that the contract has been violated by the corporation, there can be no ground for either legal or equitable relief. In ascertaining the meaning

> of the contract, the same rules of construction apply as in other cases. The words are to be interpreted according to their natural and legal import. No strained construction is to be placed upon them to meet a supposed hardship, or to relieve either party from a situation which, if it had been forseen, might have been provided for, but for which no provision was made."

The defendant in that case raised the point that, assuming the existence of earnings, plaintiffs could not recover because "it is by the contract a condition precedent to the right of the bondholders to maintain an action, that the board of directors should certify to the fact and the amount." As to this argument the New York Court of Appeals said at page 182:

> "The wrongful withholding of a certificate when demanded satisfies the condition precedent, and this is especially true where the alleged condition precedent is some act of the party who is liable to pay. In such case his wrongful inaction is no obstacle to a recovery."

The complaint was dismissed, however, because it was "fatally defective in that it does not show that there were earnings applicable to the payment of interest on the bonds, which had either been retained by the corporation or applied to other purposes" (p. 182).

CONCLUSION.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, August 23, 1945.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

MILTON POLLACK,
LUDWIG MANDEL,
of Counsel.

To be argued by
MILTON POLLACK, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 100.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

—against—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

MILTON POLLACK,
Counsel for Petitioners.

ALPERT PRESS, BROOKLYN, N. Y.; TEL. TRIANGLE 5-1058-1059

INDEX.

Subject Matter.

Cases Cited In Brief.

Statutes Cited In Brief.

To be argued by
MILTON POLLACK.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 100.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

—against—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York (R. 37-40) is reported in 59 F. Supp. 98. The opinions of the Circuit Court of Appeals for the Second Circuit (R. 45-53) are reported in 147 F. (2d) 777.

GROUNDS OF JURISDICTION.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 56) affirming a judgment of the District Court for the Southern District of New York (R. 40) comes before this Court on a writ of certiorari granted October 8, 1945 (R. 57). The jurisdiction of this Court was invoked under Section 240[a] of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347[a]).

STATEMENT OF THE CASE.

Petitioners are residents of New York and the owners and holders of Class B debentures issued by the respondent, Green Bay and Western Railroad Company, a Wisconsin railroad corporation having an office and transacting business within the State of New York and the Southern District of New York.

Petitioners instituted this action in the Supreme Court of the State of New York, New York County, on behalf of themselves and all other holders of such Class B debentures, to recover moneys due and payable in lieu of interest on the debentures out of respondent's earnings (R. 1).

On petition of the respondent alleging diversity of citizenship, the action was removed to the United States District Court for the Southern District of New York (R. 1). Thereafter the respondent moved to dismiss the complaint for lack of jurisdiction over the person on the ground that it was not doing business in New York, and for lack of jurisdiction over the subject matter on the ground that the action was concerned with the internal affairs of a foreign corporation (R. 1).

The District Court found that the respondent was present and "doing business" within the State of New York and within the Southern District of New York, and accordingly it denied respondent's motion to dismiss for lack of jurisdiction over the person (R. 41). Respondent has taken no appeal from this determination.

The District Court nonetheless dismissed the complaint, without prejudice to the institution of a similar suit in Wisconsin, on the ground that "there is a lack of jurisdiction of the subject matter of the action in that the subject matter is concerned with the internal affairs of the defendant, a foreign corporation" (R. 41). The Circuit Court affirmed (R. 56), one Judge dissenting (R. 49).

There is no dispute as to the material facts. The debentures had their inception as valid obligations in the State of New York and within the territorial limits of the federal district court below (R. 8, 20-21). The debentures are listed and traded in as bonds on the New York Stock Exchange (R. 36). They are transferable on the books of the respondent only in New York (R. 8). All amounts due on these debentures in lieu of interest are expressly made payable in New York (R. 8), and such amounts as were in fact paid by respondent were admittedly paid from New York (R. 14). The respondent maintains its financial as well as a traffic office in New York (R. 14). It maintains a bank account in New York, not only for the purpose of meeting obligations of the very character which the petitioners seek to enforce, but also for its "excess of operating funds" not needed in Wisconsin (R. 14).

Five of respondent's six directors are to be found in New York and cannot be found for service of process in Wisconsin (R. 22, 28). These directors include all executive and fiscal officers excepting only the President, who is the sixth director and who supervises operation of the railroad from Wisconsin (R. 28). In New York are to be found two of the three members of respondent's Executive Committee, which is appointed from year to year and is authorized to act for the Board of Directors during intervals between meetings (R. 22, 29).

Directors' meetings are customarily held in New York City, and respondent—though relying successfully in the Courts below on the doctrine of *forum non conveniens*—admits that such meetings have been held in New York "for the convenience of Directors" (R. 15). Respondent's finan-

cial records, its transfer books, its minute books, its seal and other corporate records are all kept in New York (R. 13, 27).

Reports filed with the Securities and Exchange Commission by respondent are signed and sealed by the Secretary-Treasurer in New York (R. 27) and the New York office of the Treasurer is the place designated for delivery of notices from the Commission (R. 26, 35).

Finally, of the thirty largest stockholders of respondent owning an aggregate of 20,633 shares out of a total of 25,000 shares of stock outstanding, all but four have New York addresses according to reports filed by respondent with the Interstate Commerce Commission (R. 28).

The theory of the complaint (R. 2-6) is that the debentures issued by respondent (R. 6-8) constitute a contract between the company and debenture holders requiring the company to pay "in lieu of interest" certain designated amounts out of annual net earnings (R. 7), after deducting reserves set up by the company (R. 8), and that the liability to pay is not discretionary on the part of respondent or its board of directors (R. 5). Respondent concedes that "the single cause of action alleged in the complaint" proceeds on such a "construction of the provisions of the certificate of incorporation and the Class B Debentures of the defendant" as would require the respondent to pay the amounts claimed by petitioners "without exercise of discretion by the directors" (R. 11, 12). A specimen of the debentures is annexed to the complaint (R. 6).

Petitioners have not joined the directors as parties to this action because under their construction of the contract and under the theory of their complaint the directors lack all discretion as to the payment claimed and no relief is required as against them. The action taken by the directors in the past, setting aside out of annual earnings reserves for additions, general improvements and depreciation, is not disputed by the petitioners but is in fact adopted as a basis for their computation of the amounts now due (R. 8). It

is the free surplus remaining after such reserves have been deducted which petitioners claim under this contract (R. 9).

Specifically, petitioners allege in their complaint that, in each of the years 1924 to 1943 (excepting 1932, 1933 and 1934) respondent had substantial net earnings in excess of the $155,000. required in each of said years to satisfy preferential payments due to holders of respondent's capital stock and Class A debentures; that after additionally deducting amounts charged against earnings in each of such years for additions, general improvements and depreciation, the aggregate amount of such net earnings was $1,649,618.85 (R. 4), of which amount the sum of $809,618.85 representing free residual earnings was improperly withheld from the Class B debenture holders and accumulated in respondent's surplus account (R. 5). Judgment directing distribution of said sum pro rata among the Class B debenture holders is requested (R. 6).

Petitioners' position is that the language used in respondent's articles of incorporation (R. 3) and in the debentures (R. 6) grants to the Class B debenture holders an absolute and unqualified contractual right "to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock" (R. 3-4). As Judge Frank expressed it in his dissenting opinion in the Circuit Court, there is no "basis for any suggestion that the directors are given any discretion in fixing the amount to be paid" (R. 50).

SPECIFICATION OF ERRORS.

Errors intended to be urged are those specified in the petition for writ of certiorari under the heading "Questions Presented" (p. 5), the Circuit Court of Appeals having ruled adversely to the contentions of petitioners upon the questions there stated. Restated, the errors are:

1. The Court erred in holding that the cause of action set forth in the complaint in this suit involves interference with the "internal affairs" of a foreign corporation.

2. Assuming that such "internal affairs" are involved, the Court erred on the facts presented in declining jurisdiction of the suit in New York under the doctrine of *forum non conveniens*.

ARGUMENT.

POINT I.

THIS SUIT DOES NOT INVOLVE INTERFERENCE WITH THE "INTERNAL AFFAIRS" OF RESPONDENT.

The Courts below have declined to exercise an admitted jurisdiction because they were of opinion that this suit involves interference with the "internal affairs" of a foreign corporation within the doctrine of *forum non conveniens*.

The District Court apparently concluded that "internal affairs" were involved because, as it said, "the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures" (R. 39). It did not stop to construe the contract sued upon. It thought that the plaintiffs' construction "inevitably and necessarily involves the internal affairs of the defendant" (R. 39), though, as pointed out by Judge Frank in his dissenting opinion, "the contractual duty of the defendant depends solely on a mathematical computation easily made" (R. 52).

Obviously, the mere fact that Wisconsin law might be involved did not justify the rejection of jurisdiction. "The general rule is that one State will enforce a cause of action arising under the laws of another; that a federal court of any district will enforce a cause of action arising under the law of any State" (*James-Dickinson Farm Mortgage Co.* v. *Harry*, 273 U. S. 119; Mr. Justice Brandeis, at p. 125). The New York courts have not hesitated to construe the charters and obligations of foreign railroad corporations in similar situations. (Cf. *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163; *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 176; *Prouty* v. *Michigan S. & N. Indiana R.R. Co.*, 1 Hun (N. Y.) 655; see also N. Y. General Corp. Law, Sec. 224.)

Nor would the fact that the Wisconsin state courts had not passed upon the precise point be cause for declining jurisdiction. In *Meredith* v. *Winter Haven*, 320 U. S. 228, Chief Justice Stone said at page 237:

> "Erie R. Co. v. Tompkins, supra, did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern. Accepting this responsibility, as was its duty, this Court has not hesitated to decide questions of state law when necessary for the disposition of a case brought to it for decision, although the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain."

Unlike the District Court, the Circuit Court did construe the debentures. Differing, however, with the construction placed upon them in the complaint, the majority were of opinion that "before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them" (R. 48). But even they agreed that "jurisdiction ought not to have been declined" if petitioners' construction of the debentures was correct (R. 48).

The majority opinion in the Circuit Court fails to discuss the provisions in the articles of incorporation and the debentures upon which petitioners rely and which Judge Frank quoted in arriving at a contrary conclusion (R. 49). These provisions in the articles of incorporation state that the holders of B debentures are "to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock" (R. 3-4), and the debentures themselves read:

> "Any surplus net earnings arising in such year which may then remain *shall* be paid to and distributed among the holders of Class B Debentures pro rata" (R. 7).*

*Italics supplied.

These debentures were first issued in 1896. While present day financing may run along different patterns, that surely is no reason for refusing to give effect to the plain language used by the respondent in placing these securities on the market. Similar language has frequently been construed to require mandatory payments of earnings involving no discretion on the part of directors, and the Courts have not hesitated to invoke well settled principles of contract law to permit a recovery in such cases.

Crocker v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. 2d 230;
Wood v. *Lary*, 47 Hun 550, appeal dismissed 124 N. Y. 83, 26 N. E. 338;
Burk v. *Ottawa Gas & Electric Co.*, 87 Kans. 6, 123 P. 857;
Cratty v. *Peoria Law Library Assn.*, 219 Ill. 516, 76 N. E. 707.

In *Day* v. *Ogdensburgh & Lake Champlain R.R. Co.*, 107 N. Y. 129, a case in which a railroad corporation was sued by income bondholders to recover amounts which plaintiffs claimed had been improperly withheld from them, the New York Court of Appeals said at pages 141-142:

> "We are to consider the relation of the parties and their respective rights as defined by contract. So far as presented in this action they depend upon the true construction of the terms of the income bonds above referred to and part of which are held and owned by the plaintiffs * * * The plaintiffs' case is put and must stand, if at all, upon the terms of the bond and upon nothing else."

In *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163, *supra*, the same Court said at page 180:

> "In ascertaining the meaning of the contract, the same rules of construction apply as in other cases. The words are to be interpreted according to their natural and legal import."

The majority in the Circuit Court appear to have rested their construction of the debentures on the clause providing that the amounts payable "*will* be fixed and declared by the Board of Directors" (R. 7).* Obviously, the use of the simple declarative in this sentence does not lessen the preceding mandatory language. As pointed out by Judge Frank (R. 51), under such a provision a resolution by the directors is purely ministerial since the directors lack all discretion, and the obligation of the respondent to make payment of the amounts withheld is complete without any resolution. In the *Thomas* case, *supra*, the defendant argued that the plaintiffs could not recover because "it is by the contract a condition precedent to the right of the bondholders to maintain an action, that the board of directors should certify to the fact and the amount." Overruling this argument, the New York Court of Appeals said at page 182:

> "It would be a very unreasonable construction of the contract that the bondholders are concluded by the omission of the board of directors to certify, although there were earnings in excess of the fair charges against them, applicable to the payment of interest. The wrongful withholding of a certificate when demanded satisfies the condition precedent, and this is especially true where the alleged condition precedent is some act of the party who is liable to pay. In such case his wrongful inaction is no obstacle to a recovery."

Since the contract sued upon contains an absolute and unqualified obligation on the part of the respondent to pay the amounts claimed in this suit—the amounts are undisputed—it seems clear to us, as it did to Judge Frank, that there is no interference with the "internal affairs" of the respondent and hence that there is no room for any application of the doctrine of *forum non conveniens*.

---

* Italics supplied.

POINT II.

ASSUMING ARGUENDO THAT THE DOCTRINE OF FORUM NON CONVENIENS HAS ANY APPLICATION, IT WAS AN ABUSE OF DISCRETION TO DECLINE JURISDICTION ON THE FACTS PRESENTED IN THIS CASE.

The District Court, being of opinion that the "internal affairs" of respondent were involved, concluded that jurisdiction should be declined on two grounds, which it stated as follows (R. 40):

> "(1) The defendant should not be put to the burden and expense of carrying on the litigation so far away as New York from its home State of Wisconsin.
>
> (2) When avoidable, the full calendars of this court should not be further crowded by adding another suit of substantial proportions (such as this obviously is) when there is open to the plaintiffs another forum, which is not only equally capable, but more accessible to the defendant."

The undisputed facts in this record are themselves the best answer to any claim that the respondent is being subjected to any undue burden by carrying on this litigation in New York. A place more convenient to the respondent than New York for the conduct of this litigation is hard to imagine. Wisconsin appears to be the place of least convenience. The notion that New York was more burdensome to the respondent than Wisconsin for the conduct of this litigation was wholly unrealistic. The fact that the petitioners were themselves residents of New York seems to have carried no weight.

Nor does it seem to us to be a proper application of the doctrine of *forum non conveniens* to decline jurisdiction because of the crowded calendars in the forum chosen by petitioners. We do not believe that the condition of the calendar is a consideration determining the acceptance or rejection of jurisdiction. We understand the term "conveni-

ence" when used in connection with the doctrine of *forum non conveniens* to refer to the convenience of litigants rather than to the convenience of the court. In *Meredith* v. *Winter Haven*, 320 U. S. 228, *supra*, Chief Justice Stone said, at page 234:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience."

In the Circuit Court, the majority, proceeding on the assumption that the exercise of discretion by directors was involved, held that the District Court did not abuse its discretion in declining jurisdiction and remitting the parties to Wisconsin, where, said the Court, "both corporation and directors can be sued" (R. 49). Here again was a wholly unrealistic conclusion, for the assumption that the directors were amenable to process in Wisconsin appears to be contradicted by the record.

The undisputed facts in this record indicate that the directors are to be found for service of process in New York, where five of defendant's six directors reside or have their places of business and where directors' meetings are—*for the sake of their own convenience,* as respondent itself states—customarily and regularly held (R. 15). If, as the Court below has held, discretion is involved and corporate action by the directors is required, New York and not Wisconsin is the jurisdiction where the necessary parties are to be found. It seems manifest error then to invoke the doctrine of *forum non conveniens* to make it impossible for the petitioners to sue in the only district in which they can obtain jurisdiction over all necessary parties. Such a result moved Judge Frank in the Circuit Court to say that the doctrine applied here by the majority in that Court "might well be called '*forum inconveniens*'" (R. 52).

Both the District Court and the Circuit Court cited *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, in support of their rulings. But in the *Rogers* case it was emphasized, in both the majority and minority opinions, that considerations of

convenience and justice are paramount in the application of the doctrine of *forum non conveniens*. This Court there said:

> "* * * it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case."

Although a very substantial interference with internal affairs was involved in the *Rogers* case, Justices Stone, Brandeis and Cardozo nevertheless dissented and were of opinion that on the facts presented jurisdiction should have been assumed.

The two remaining cases cited in the opinions below are readily distinguishable. In *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, the relief requested was that the defendant be directed either to redeem its shares of stock at par value with accumulated interest or, in the alternative, that the defendant directors be compelled to declare a dividend out of surplus "at an equitable rate" and allegedly withheld in bad faith. Thus the case involved a very real interference with internal affairs; it would have required the exercise of the court's visitorial powers and raised problems of administration and enforcement. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, the other case cited by the Courts below, involved nullification of a foreign corporate charter and such other extensive relief that Circuit Judge Clark was moved to say that he could "hardly imagine a more complete interference with the internal affairs of a foreign corporation."

In the case at bar, no problem of administration is presented. The Court is not asked to exercise its visitorial powers over a foreign corporation; it is not asked to interfere with the directors' discretion; for it is petitioners' contention and the theory of their complaint that there is no discretion to be exercised. It is not an action in which a receiver is requested nor one in which changes in corporate

structure are sought as part of the relief. No reclassification or redemption of stock, or any similar far reaching relief, is sought.

There are no obstacles to the rendition of an effective decree. The federal court sitting in New York is in fact in a better position to enforce its decree than would be the branch of the federal court sitting in Wisconsin. The respondent is present in New York. With one exception, all of respondent's officers and directors are similarly to be found here. Its financial records are here. Funds for the purpose of meeting its obligations on these debentures are habitually kept here. What reasonable excuse then can there be for permitting the defendant to escape the jurisdiction of the federal court in New York? Surely not the doctrine of *forum non conveniens!* That doctrine, as Mr. Justice Cardozo pointed out in the *Rogers* case, is "an instrument of justice" (p. 151). "The rule is intended to promote justice and not to furnish an avenue of escape for those who should answer somewhere for the wrongs charged against them" (*Overfield* v. *Pennroad Corporation*, 113 F. (2d) 6, 10).

We submit that every consideration of convenience, efficiency and justice points to New York, the forum selected by the petitioners, as the only "appropriate forum" within the holding in the *Rogers* case.

This Court in *Meredith* v. *Winter Haven*, 320 U. S. 228, *supra*, indicated its concern with the failure of a federal district court to exercise its avowed diversity jurisdiction, in the absence of powerful considerations justifying non-exercise. We submit that the failure of the District Court to exercise its admitted jurisdiction in the case at bar was entirely unjustified.

POINT III.

NO QUESTIONS OF PUBLIC POLICY ARE INVOLVED UNDER PETITIONERS' CONSTRUCTION OF THE DEBENTURES.

In resisting petitioners' application for a writ of certiorari, respondent cited the case of *New York, etc. Railroad* v. *Nickals*, 119 U. S. 296, in support of the contention that petitioners' construction of the debentures would so impair the ability of the respondent railroad to maintain its road as to make the contract void as against public policy. The cited case is clearly distinguishable.

In the *Nickals* case, the plaintiffs, preferred stockholders, claimed that the application of net profits from operations towards providing additions and improvements to the railroad was "a violation of rights secured to preferred stockholders" under their contract (p. 302). The Court held that such expenditures were necessary and made "in good faith" (p. 303). Notwithstanding such a finding, the lower Court held that the preferred stockholders had an absolute right to receive annual dividends of 6% out of annual net earnings *before* deducting expenditures for improvements and additions. This interpretation of the contract was held by this Court to be "an erroneous interpretation of both the agreement and the company's charter" (p. 304). Buttressing its position, the Court went on to say that a different view would "lead to results which sound policy would seem to forbid" in that it would prevent the railroad from fulfilling its duty "to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight" (p. 306).

Reference to Exhibit "B" attached to the complaint (R. 8) indicates clearly that no such problem is involved in the present case. Petitioners do not seek to avoid any expenditures or provisions made by the company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and to charge

expenditures of this character against annual earnings is expressly recognized in Exhibit "B" attached to the complaint, for petitioners claim only such residual earnings as remain "after deducting reserves for additions, general improvements and depreciation" (P. 4, 8). Thus any claimed violation of public policy in the *Nickals* case, *supra*, simply cannot exist here.

In any event, the District Court for the Southern District of New York is as qualified to pass upon this point as is the District Court in Wisconsin.

CONCLUSION.

THE JUDGMENT BELOW SHOULD BE REVERSED, AND THE COMPLAINT REINSTATED.

Respectfully submitted,

MILTON POLLACK,
Counsel for Petitioners.

MILTON POLLACK,
LUDWIG MANDEL,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1335. 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CADWALADER, WICKERSHAM & TAFT,
WM. LLOYD KITCHEL,
Attorneys for Respondent.

WM. LLOYD KITCHEL,
MERRILL M. MANNING,
WALTER BRUCHHAUSEN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

TABLE OF CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1335.

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinions of the Circuit Court of Appeals (58-66) are reported in 147 Fed. (2d) 777 (C. C. A. 2nd, 1945). The opinion of the District Court (48-51) is reported in 59 Fed. Supp. 98 (S. D. N. Y., 1944).

The Petitioners Have No Valid Ground for Their Application for Writ of Certiorari.

The petitioners contend that the leading case of *Rogers v. Guaranty Trust Co.*, 288 U. S. 123 (1933) on the subject of *forum non conveniens* has been the subject of doubt in

the lower federal courts. An analysis of that case and others cited by the petitioners demonstrates that the principle of law is not in doubt. The doubt in the *Rogers* case pertained to the application of the rule to the peculiar state of facts therein involved and not as to the law.

That principle was reiterated in the later case of *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), wherein Mr. Justice Stone said (p. 185):

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state."

This action involves the distribution of surplus earnings, analogous to dividends, of a foreign corporation. The Class B Debentures are the junior equity security of the corporation. If is settled law that such a matter is an internal affair of the corporation, justifying the District Court in exercising its discretion to decline jurisdiction.

Statement of the Case.

The respondent respectfully prays that this Court deny the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York.

The judgment so appealed from dismissed the complaint for lack of jurisdiction of the subject matter in that the subject matter is concerned with the internal affairs of the defendant-respondent, a foreign corporation, without prejudice to the institution of the action in Wisconsin.

The Nature of the Complaint.

The petitioners are some of the holders of the Class B debentures, issued by the defendant-respondent.

The gist of the complaint is described by Mr. William F. Unger, one of the petitioners' attorneys, as follows:

> "The action is brought * * * to recover the amounts payable on such debentures in lieu of interest and to compel a distribution of earnings in accordance with the provisions of the defendant's Articles of Incorporation and the debentures issued thereunder" (26, 27).

Judge Caffey in the District Court stated the nature of the action to be as follows:

> "In other words, among other things, the plaintiffs seek an interpretation of Wisconsin law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.
>
> "It seems to me manifest that the law suit is a litigation which inevitably and necessarily involves the internal affairs of the defendant (50).
>
> * * * * * *
>
> "If I be right in thinking that the pending action hinges around and must turn on the internal affairs of the defendant then this court is authorized to decline to retain jurisdiction of it (*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130-1, and *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105. Cf. *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 Fed. (2d) 111, 113)" (50, 51).

The pertinent clause of the debentures sued upon provides that:

> "So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows viz: * * * (the deleted matter refers to payments to senior security holders limited to 5% of principal amount) * * *, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *" (8, 9).

The Issues on This Application.

1. That it is settled law that jurisdiction in cases involving the internal affairs of foreign corporations should be relinquished in favor of courts of the states where such corporations were organized and particularly that the jurisdiction was properly relinquished in this case to the courts of Wisconsin.

2. That this action involves the distribution of surplus earnings, analogous to dividends, of a foreign corporation, which is an internal affair and jurisdiction was properly declined.

POINT I.

The law is settled that jurisdiction in cases involving the internal affairs of foreign corporations should be relinquished in favor of the courts of the states where such corporations were organized.

The leading cases supporting the principle are:

Rogers v. *Guaranty Trust Company*, 288 U. S. 123 (1933);

Pennsylvania v. *Williams*, 294 U. S. 176 (1935);

Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931);

Goldstein v. *Lightner*, 266 App. Div. 357 (1st Dept. 1943), aff'd 292 N. Y. 670 (1944);

Strassburger v. *Singer Manufacturing Co.*, 263 App. Div. 518 (1st Dept. 1942);

Miesse v. *Seiberling Rubber Co.*, 264 App. Div. 373 (1st Dept. 1942);

Nothiger v. *Corrbon & Reynolds Corporation*, 266 App. Div. 299 (1st Dept. 1943), aff'd. 293 N. Y. 682 (1944).

In *Pennsylvania* v. *Williams*, *supra*, cited with approval in the later case of *Meredith* v. *Winter Haven*, 320 U. S. 228, Mr. Justice Stone said:

> "It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state."

The earlier case of *Rogers* v. *Guaranty Trust Co.*, *supra*, sets forth the same principle, also stating (p. 130):

> "When, by acquisition of his stock, plaintiff became a member of the corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the state in which it was organized."

The dissenting opinions in that case did not challenge the rule. They fully supported it. Mr. Justice Stone in his dissent, concurred in by Mr. Justice Brandeis, said (p. 144):

> "We may assume, without deciding, that neither a federal nor a state court of equity will, as a general rule, undertake to administer the internal affairs of a foreign corporation."

The Court's decision in the *Rogers* case was, as stated by Mr. Justice Stone, based on the contention that the case did not present a "problem of administration (of the corporation's internal affairs)." Judge Clark in *Cohen* v. *American Window Glass Company*, 126 Fed. (2d) 111 (C. C. A. 2nd, 1942), at page 113, makes the same point by stating:

> "Their (the dissenting Justices') quarrel was over the application of the rule to the case before them."

Likewise in *Kelley* v. *American Sugar Refining Co.*, 139 Fed. (2d) 76 (C. C. A. 1st, 1943), the Court said (p. 78):

> "* * * the strong dissenting opinions * * * (in *Rogers* v. *Guaranty Trust Co.*) leave the rule itself intact for application to a proper case."

The basis for the rule of noninterference with the internal affairs of a foreign corporation is set forth in *Overfield* v. *Pennroad Corporation*, 113 Fed. (2d) 6 (C. C. A. 3rd,

1940), cited by the petitioners, wherein the Court said (p. 12):

> "The reason the state court of equity declines to take jurisdiction of a suit involving the internal affairs of a foreign corporation is because the matter will require the exercise of visitorial power."

The *Overfield* case cited *Thompson* v. *Southern Connellsville Coke Co.*, 269 Pa. 500, 112 Atl. 533 (1921), wherein the Court said (p. 504):

> "* * * "* * The purpose of visitation is to supervise, direct, and control the management of the corporation": 14 *Corpus Juris*, 341, Art. 2198'
>
> * * * * * *
>
> "We are asked to construe a West Virginia statute regulating the internal management of corporations created in that state and involving a broad question of its public policy; our construction might not be in full accord with the views of the courts of that jurisdiction, in which event there would be presented to corporations there created, and doing business here, the anomalous and confusing situation that management in their home state is regulated in one way and here in another."

The petitioners contend that the fact that they reside in New York City and that some of the respondent's activities are there makes the Southern District of New York a more convenient place for trial. The opinion in *Rogers* v. *Guaranty Trust Company* in the lower court, reported in 60 Fed. (2d) 114, reveals that the foreign corporation therein involved had its principal office in New York City, where its chief executives were located and where its Board of Directors held its meetings and kept its corporate records, and yet jurisdiction in New York was declined.

In *Strassburger* v. *Singer Manufacturing Company, supra,* relied upon in the later case of *Goldstein* v. *Lightner, supra,* affirmed in 292 N. Y. 670, the complaint, included in the case on appeal therein, disclosed that the corporation involved was incorporated in a foreign state, New Jersey, that it had its main offices in New York, that it kept its books and records in New York, that it was managed by its officers and directors in New York and held its stockholders' and directors' meetings there and yet the New York Courts declined jurisdiction.

Whether or not the respondent's directors are amenable to process in Wisconsin is in no wise relevant. They are not made parties to the action. Judge Caffey, in the Court below, stated, as a reason why this case should be tried in Wisconsin, as follows:

> "Moreover, all the physical properties of the defendant (the respondent) which are operated and from which it derives earnings are located in Wisconsin, the State of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept" (50).

Additional reasons which appealed to Judge Caffey in connection with his decision to decline jurisdiction were those stated in his opinion, and emphasized on page 11 of the petitioners' brief, (1) that the defendant (respondent) should not be put to the burden and expense of carrying on the litigation so far away as New York from its home state of Wisconsin, and (2) that when avoidable the full calendars of the District Court should not be crowded by a complicated cause of action which could better be tried in the forum of the domicile of the defendant (respondent) corporation.

However, these are merely reasons additional to the basic reason that the cause of action involved the internal management of a foreign corporation. The charge that Judge Caffey abused his discretion in declining jurisdiction in this case remains totally unsubstantiated.

The cases of *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157 (1881) and *Day* v. *Ogdensburgh and Lake Champlain R. R. Co.*, 107 N. Y. 129 (1887), cited by the petitioners, involved domestic and not foreign corporations. In *Thomas* v. *New York & Greenwood Lake Ry. Co.*, 139 N. Y. 163 (1893), the complaint was dismissed, the Court holding that the issue pertained to the discretion of the directors, an internal affair of the corporation. In *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1 Hun. 655 (N. Y. 1874), no jurisdictional question was raised.

POINT II.

This action involved the distribution of surplus earnings, analogous to dividends, of a foreign corporation, which is an internal affair and jurisdiction was properly declined.

The complaint, as described by the petitioners' attorney (page 3 of this brief) and the provisions of the said Class B Debentures (page 4 of this brief), coupled with the facts in the record that the respondent is a railroad corporation with its lines of railroad in Wisconsin (16), demonstrate that at the trial of the action on the merits, no matter in what forum such trial shall be held, the questions to be resolved must include a construction of the foregoing provisions of the Class B Debentures as to whether they grant discretion to the directors in any year

not to pay out to security holders the entire earnings of the Railroad for that year; also whether the opposite construction contended for by the petitioners, i.e., to require the railroad company to pay out to security holders every cent of its earnings in each year, would so impair its ability to perform the service required by law as a common carrier and public utility as to make any such contract void as against the public policy of the State of Wisconsin.

In support of this latter statement the language of this Court in the case of *New York etc. Railroad* v. *Nickals*, 119 U. S. 296 (1886), is very much in point. In that case, in construing the provisions of the contract between the corporation and its stockholders so as not to deprive the directors of discretion as to whether dividend distributions should be paid out in any year, the Court said (p. 304):

> "As was said by the court, in *Clearwater* v. *Meredith*, 1 Wall. 25, 40, 'when any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized.' The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock.
>
> . . . . . .
>
> "A different view would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders be-

come entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. * * * the former are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole."

The petitioners in their petition (4) assert that nothing more is involved in this litigation than an action in contract on an obligation made and to be performed in New York, the statement in their brief being to the effect that the securities (i.e., the Class B Debentures) which the petitioners "purchased", had their inception as valid obligations in New York and are there transferable and payable.

The facts are that the Class B Debentures are a very unusual type of security, the junior equity security issued by the respondent, a position normally occupied by common stock. The Class B Debentures are junior to the Class A Debentures and the so-called Common Stock (20). In the event of reorganization or sale, which is the only maturity date of the debentures (8), the holders are entitled to everything remaining after payment of the face amount of the Class A Debentures ($600,000) and the Common Stock ($2,500,000) (9). Therefore all restrictions on distributions of annual earnings deemed necessary for the best interests

of the Railroad operate to the ultimate benefit of the holders of the Class B Debentures.

Although distributions and any payments of principal are payable in New York City and although the Class B Debentures do bear a certificate of authentication by a New York agent, a customary requirement for securities listed on the New York Stock Exchange, they were originally issued in the year 1896 pursuant to a plan of reorganization of predecessor companies resulting from a foreclosure action in the Federal District Court in Wisconsin (20).

Thus, in connection with the questions presented on the application for a writ of certiorari, the Class A Debentures are analogous to First Preferred Stock, the Common Stock resembles Voting Second Preferred Stock and the Class B Debentures are a form of Non-Voting Common Stock.

In addition to the foregoing, there is another question involved in this litigation which is of importance for the Court to consider on the point made by petitioners that the District Court so abused discretion in its application of the rule *forum non conveniens* in declining jurisdiction as to warrant the granting of the writ applied for. This further question arises because the petitioners are necessarily attempting to obtain a construction of a provision of the Class B Debentures and the Articles of Incorporation which would be binding upon all of the debentureholders. The Class B Debentures are widely distributed among holders as is evidenced by the fact they are listed on the New York Stock Exchange (29).

It is to the best interests of these widely distributed holders of the securities and of the Corporation that this construction be determined by a single jurisdiction and

not by each of the many jurisdictions in which various holders reside. The natural and logical jurisdiction is Wisconsin, the state of incorporation of the respondent railroad corporation.

The majority opinion in this case in the Second Circuit Court of Appeals sets forth in part as follows (p. 779):

> "The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for the view that the provision in the debentures, that the sums, if any, due were to be fixed and declared by the directors, meant just that, the long practise in accordance therewith and the long acquiescence of the debenture holders in that practise would provide it" (147 Fed. (2d) 777 (C. C. A. 2nd, 1945)).

The law is settled that actions to compel the payment of dividends or for similar relief involve the internal affairs of the corporation.

In the leading case of *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931), the plaintiff demanded judgment that the defendant, a foreign corporation, either redeem shares of its stock at par value or, in the alternative, declare a dividend out of its surplus. The Court, after stating the prin-

ciple that jurisdiction will not be taken to regulate the internal affairs of a foreign corporation, said (p. 105):

> "While it is not always easy to say when jurisdiction will be taken and when declined, and while contracts between a foreign corporation and its members will usually be enforced in the courts of this State, it seems clear that the jurisdiction now invoked must be declined under the principle stated."

In *Rogers* v. *Guaranty Trust Co., supra,* the plaintiff did not seek to compel the payment of distributions from surplus earnings, analogous to dividends, as in the case at bar. Even the dissenting justices in that case were of the opinion that a suit of that nature would involve the internal affairs of the corporation, for Mr. Justice Stone, in his dissenting opinion, concurred in by Mr. Justice Brandeis, said (p. 144):

> "But the case before us is, in this respect, unlike a suit to * * * compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102."

In *Cohn* v. *Mishkoff Costello Co., supra,* the Court gave the reason for declining jurisdiction, when it said:

> "* * * internal affairs * * * ought to be managed under the laws and by the direction of the courts of the State * * * where it is organized."

Overfield v. *Pennroad Corporation,* 113 Fed. (2d) 6 (C. C. A. 3rd, 1940), cited by the petitioners, elaborates upon the reasoning for declining jurisdiction by stating (pp. 12, 13):

> "Such (visitorial) power (the Court) * * * will not exercise over a foreign corporation, nor will it interfere in determining the rights or duties of the directors or officers of the corporation under the laws of a foreign jurisdiction. * * *

> "* * * an action * * * against a foreign corporation to 'recover the amount of certain dividends' which the plaintiff stockholders averred 'should have been declared and paid, upon the stock owned by them',—clearly a matter for corporate action subject to the requirements and limitations of the laws of the state of the corporation's domicile."

In *Thompson* v. *Southern Connellsville Coke Co.*, 269 Pa. 500, 112 Atl. 533 (1921) cited in the *Overfield* case, *supra*, the Court said (p. 503):

> "Where the act * * * affects the complainant solely in his capacity as a member of the corporation * * * as stockholder * * * and is the act of the corporation * * * through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction."

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y., July 13, 1945.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT,
WM. LLOYD KITCHEL,
Attorneys for Respondent.

WM. LLOYD KITCHEL,
MERRILL M. MANNING,
WALTER BRUCHHAUSEN,
Of Counsel.

To be argued by
W. LLOYD KITCHEL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

ANSWERING BRIEF FOR RESPONDENT.

CADWALADER, WICKERSHAM & TAFT,
Attorneys for Respondent.

W. LLOYD KITCHEL,
MERRILL M. MANNING,
WALTER BRUCHHAUSEN,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

Table of Cases.

Text Books

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of GREEN BAY AND WESTERN RAILROAD COMPANY,

Petitioners,

against

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

ANSWERING BRIEF FOR RESPONDENT.

The Opinions Below.

The Opinions of the United States Circuit Court of Appeals for the Second Circuit (R. 45-55) are reported in 147 Fed. (2nd) 777 (C. C. A. 2nd, 1945). The Opinion of the District Court (R. 37-40) is reported in 59 Fed. Supp. 98 (S. D. N. Y. 1944).

Grounds of Jurisdiction.

The case comes to this Court on a writ of certiorari granted October 8, 1945 to the Circuit Court of Appeals for the Second Circuit which affirmed the District Court for the

Southern District of New York in granting a motion to dismiss the complaint on the ground that the complaint involved the internal affairs of a foreign corporation and should be tried at the domicile of the corporation, Wisconsin.

Statement of the Case.

Respondent is a railroad corporation incorporated under the laws of Wisconsin and operating its railroad lines solely within that State, and within that State maintaining its main business offices and keeping its chief records. (R. 12).

It has been sued in the District Court below, in a representative action, by Petitioners, who hold some of its Class B Debentures. Petitioners in their brief, page 5, state their position in the litigation to be as follows:

> "Petitioners' position is that the language used in respondent's articles of incorporation (R. 3) and in the debentures (R. 6) grants to the Class B debentureholders an absolute and unqualified contractual right 'to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock' (R. 3-4)."

After the complaint had been filed in the District Court, Respondent made a motion to dismiss on the ground that the construction of the Class B Debentures, relating as it did, to the matter of distribution of surplus earnings, analogous to dividends, upon or after action taken by the Board of Directors, involved the internal affairs of a foreign corporation and properly should be tried in Wisconsin (R. 19).

Respondent also contended in the Courts below, as a railroad corporation and a common carrier operating in Wisconsin, subject to the duties of common carriers, that the construction of the Class B Debentures claimed by Petitioners which would force distribution by Respondent of all its net earnings to security holders, would limit or destroy the ability of Respondent to fulfill its duties as such a public carrier; that thereby necessarily the interests of the public, principally in Wisconsin, are affected and the Courts of that State are the proper Courts to determine the construction of the contract.

The capitalization of Respondent consists of $600,000 face amount of Class A Income Debentures, $2,500,000 par amount of Common Stock and $7,000,000 face amount of Class B Debentures (R. 15); the Class B Debentures being the debentures sued upon by Petitioners in the District Court below. All of these securities, including the Class B Debentures, were originally issued in 1896 pursuant to a plan of reorganization of the Respondent Railroad (R. 15). This reorganization resulted in connection with foreclosure action instituted in the Circuit Court of the United States for the Eastern District of Wisconsin in 1896.

The Class A Debentures and the Common Stock are securities senior to the Class B Debentures and are entitled to receive maximum income distributions of 5% of their face or par amount in any year before Class B Debentures receive any payment. The Class B Income Debentures are, therefore, junior equity securities (R. 15).

The Class B Debentures have no maturity date, are payable as to principal only in the event of a sale or reorganization of the railroad and property of the Respondent; in

the event of any such sale or reorganization, the net proceeds after payment of all liens and charges thereon are to be distributed, first, among the holders of Class A Debentures and the Capital Stock, and after such payments have been made, any surplus remaining is to be paid to the holders of Class B Debentures (R. 6-8).

The pertinent provisions of the Class B Debentures relating to distribution of income are as follows:

> "So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz: * * * (the deleted matter refers to payments to senior security holders limited to 5% of principal amount) * * *, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *" (R. 7-8).

Judge Caffey in the District Court found that the action hinged around the internal affairs of the Respondent and was litigation "which inevitably and necessarily involves the internal affairs of the defendant" (R. 39).

The Circuit Court of Appeals for the Second Circuit affirmed (R. 56), one Judge dissenting (R. 49). Petition for rehearing was denied (R. 55).

The Issues Involved.

The comprehensive issue involved before this Court relates solely to jurisdiction, i.e. whether or not the District Court abused its discretion in refusing to entertain jurisdiction on the ground of *"forum non conveniens"*.

The merits of the suit below should not be decided in the instant proceeding before this Court. In the trial of the issues of such suit, whether resumed in the District Court or in a suit under jurisdiction of the Courts of Wisconsin, the Respondent's contention will be that there is language in the Class B Debentures which indicates that the directors have discretion in fixing and declaring distributions on the Class B Debentures to pay out only such amounts as they deem advisable and prudent under all the circumstances. Also, in connection with such contention for construction, the Respondent will claim that not only will the direct language of the provisions of the Class B Debentures be involved but also the surrounding circumstances of issuance and other pertinent factors (including possibly parol evidence by reason of ambiguity) which may be presented to a court for the purpose of determining the construction of a contract. There is nothing in the nature of a demurrer or its equivalent in this case which would warrant a final determination of the merits.

POINT I.

This suit involves questions relating to the internal affairs of the Respondent, a foreign corporation, within the doctrine of *forum non conveniens*.

Judge Frank was in error in stating in his dissenting opinion in the Circuit Court of Appeals that the only ground for sending the case to trial in Wisconsin was the alleged need for examination of Wisconsin Law. Neither the District Court nor the majority in the Circuit Court so held. The District Judge wrote:

> "If I be right as to internal affairs of the defendant being involved in the present suit, then it is within the discretion of this Court to dismiss it." (R. 40)

The order and judgment of the District Court were to the same effect (R. 41). The Circuit Court, in its majority opinion, affirmed upon that same ground (R. 47). The Petitioners at pages 3 and 7 (first paragraph) of their brief concede that both of the said courts so ruled. Strangely, however, the second and third paragraphs on page 7 directly contradict that concession. The Petitioners, by quoting only part of a sentence of the District Judge's opinion in the said paragraphs, imply that the District Judge not only failed to construe the Debenture but that his decision was based upon the mere fact that Wisconsin Law was involved. A comparison of the part of the sentence so quoted with the complete text and the record itself destroys those conclusions.

The portion of the said opinion, as quoted by the Petitioners on page 7 of their brief and their comment is as follows:

"The District Court apparently concluded that 'internal affairs' were involved because, as it said, 'the plaintiffs seek an interpretation of Wisconsin Law, of the articles of incorporation and of the B Debentures' (R. 39). It did not stop to construe the contract sued upon".

What the District Judge really said was as follows:

"In other words, among other things, the plaintiffs seek an interpretation of Wisconsin Law, of the articles of incorporation and of the B debentures which, without permitting discretion to be exercised by the directors, would force the defendant (Respondent) to pay to the B holders all surplus earnings for each year since 1924 after annually paying the holders of the common stock and of the A debentures 5% of the face thereof.

"It seems to be manifest that the lawsuit is a litigation which inevitably involves the internal affairs of the defendant (Respondent)" (R. 39).

It is apparent that the District Judge decided that the action involved the internal affairs of the Respondent because it sought a distribution of the earnings without permitting the directors to exercise their discretion, and that the court construed the Debentures as vesting the Directors with such discretion.

The Petitioners' position as set forth on page 5 of their brief is that the language used in the Articles of Incorporation (R. 3) and in the Debentures (R. 6) grants to the Class B Debentureholders an absolute and unqualified contractual right to receive any net earnings of the Railroad and property in each year remaining after payment of limited amounts to holders of senior securities.

The pertinent part of the said Debentures, providing for the payment of principal, is as follows:

> "* * * (the) sum of One Thousand Dollars will be payable to the bearer hereof * * * only in the event of a sale or reorganization of the railroad and property of said Company, and then only out of any net proceeds of such sale or reorganization which may remain after payment of any liens or charges upon such railroad or property, and after payment of Six Hundred Thousand Dollars of a series of debentures known as Class A, issued to or to be issued by said Company, and the sum of Two Million, Five Hundred Thousand Dollars to and among the stockholders of said Company. Any such net proceeds remaining after such payments shall be distributed pro rata to and among the holders of this series of Class B Debentures." (R. 6, 7)

The said Debentures provide for payment of income, as follows:

> "* * * the holders * * * shall in lieu of interest thereon participate in the distribution of annual net income to the following extent only, viz:—So much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied as follows (five percent upon the face value of the Class Debentures and on the par value of the common stock) *and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of Class B Debentures pro rata.* None of such payments shall be cumulative. The amounts, if any, payable on this series of Debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February,

> in the following year, and when so declared, any amount payable hereon will be paid * * *." (R. 7, 8) (italics supplied)

The Petitioners in their brief and Judge Frank in his dissenting opinion in the Court below quote and emphasize the language we have above italicized. The Petitioners omit all reference to the language of the Debenture following the part so italicized, which refers to the discretion of the Board of Directors. Judge Frank quotes part of it, to-wit:

> "* * * the amount payable will be fixed and declared by the Board of Directors." (R. 51)

The complete sentence, which we emphasize, is as follows:

> "The amounts, if any, payable on this series of Debentures of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared, any amount payable hereon will be paid * * *." (R. 7, 8)

Neither the Petitioners nor Judge Frank have mentioned or referred to the words "if any", contained in the first part of the complete sentence above quoted. The gist of the sentence is that it is for the Board to determine what part, if any, of the net earnings shall be paid to the holders of the Debentures. That the question of distribution of net earnings is vested in the Board of Directors and is a matter for their discretion is clearly established by the phrase, not mentioned by the Petitioners or Judge Frank, to-wit:

> "* * * when so declared, any amount payable hereon will be paid. * * *"

In other words, if the Board deems it inadvisable to declare a distribution, nothing shall be paid.

Also as demonstrating that the question of distribution of net earnings is vested in the Board of Directors, reference is made to the provision of the Debentures defining the participation of the debenture holders in the annual net income and stating that "So much of the annual net earnings in any year as would be applicable to the payment of dividends on stock shall be applied as follows:". The payment of dividends on stock is always subject to the discretion of the Board of Directors.

The Petitioners on page 8 of their brief refer to the provisions in the Articles of Incorporation stating that the holders of B Debentures are "to be entitled to receive in lieu of interest thereon any net earnings of the railroad and property in each year remaining after payment of five per cent upon the said Class A Debentures and the said stock". They fail to call attention to the further provision of the Articles of Incorporation reading as follows:

> "the said debentures to contain such further provisions as may be agreed upon between the Company and the said purchasers."

Pursuant to the clause last above quoted the Class B Debentures when issued did contain a further provision to the effect that the amounts payable upon the Class B Debentures "will be fixed and declared by the Board of Directors on or before the first day of February, in the following year, and when so declared any amount payable thereon

will be paid * * *". By the acceptance of the Debentures with this provision contained therein the holders thereof became bound thereby.

Cases in which, after trial or other proceedings upon the merits, discretion in the Board of Directors has been found in connection with distributions or interest on bonds or debentures of corporations, are the following:

Green Bay and Western Railroad Company, et al. v. *Commissioner of Internal Revenue*, 147 Fed. (2d) 585;

Day v. *Ogdensburgh & Lake Champlain Railroad Co.*, 107 N. Y. 129;

New York, Lake Erie & Western Railroad v. *Nickals*, 119 U. S. 296.

The Circuit Court of Appeals for the Second Circuit in the majority opinion in the instant case and the Circuit Court of Appeals for the Seventh Circuit have held that the distribution of the net earnings was discretionary with the Respondent's Board of Directors.

The Circuit Court of Appeals for the Second Circuit in the instant case said (p. 779):

> "If we could agree with appellants' assumption that the suit involved nothing except a claim upon a liquidated demand, that in short the contract of the Class B Debentures operated of itself to set apart and appropriate each year to those debentures the specific sums plaintiffs sue for, and that the fixing and declaration of the amounts by the directors was a mere formality, we should agree that jurisdiction ought not to have been declined. But we think it clear that this is an over-simplified view of what the

debentures intended to, and did, provide. The provision for declaration and payment of sums due annually under the debentures, as well as the long continued practice under it for the many years in question, leave in no doubt, we think, that before any sums became due and payable under the debentures, corporate action had to be taken to fix and determine them. Instead of carrying a fixed rate of interest, the debentures promised, in lieu thereof, a contingent portion of the annual net earnings, this interest to be ascertained, fixed and declared in each year by the directors. According to the claim, the directors in each of the years but three fixed and declared, and the appellee paid the amounts determined to be due. If, therefore, support were needed for the view that the provisions in the debentures, that the sums, if any, due were to be fixed and declared by the directors, mean just that, the long practice in accordance therewith and the long acquiescence of the debenture holders in that practice would provide it. * * *" (R. 45).

In *Green Bay and Western Railroad Company, et al.* v. *Commissioner of Internal Revenue*, 147 Fed. (2d) 585, (1945), the Circuit Court of Appeals for the Seventh Circuit, deciding that distributions on the Class B Debentures could not be deducted for the purpose of income tax, had occasion to pass on the nature of the Class B Debentures and found that there was discretion in the Board of Directors in the payment of distributions. The Court, referring to the Class B Debentures of the Respondent, said (p. 586):

"The debentures on their face disclose that they had no fixed maturity; that the dividends were not cumulative and were payable within the discretion of the board of directors; that there was no pro-

vision for interest on unpaid dividends: that the debenture holders had no right to maintain an action in case of default as to the payment of dividends inasmuch as such payment was in the discretion of the board of directors; that the status of the debenture holders of class A was on a par with that of stockholders; and that rights of the debenture holders, both class A and class B, were inferior to those of creditors. Moreover, the investments in the debentures represent value paid in at the time of petitioner's incorporation and constitute a large part of its operating capital. Furthermore, the investments can be withdrawn only at the dissolution of the corporation. They are subject to the hazards of the business and in our opinion may properly be be designated as a part of the capital structure."

The case of *Day v. Ogdensburgh and Lake Champlain Railroad Company*, 107 N. Y. 129 (1887) involved a representative action brought by plaintiffs as owners of certain income mortgage bonds issued by the defendant railroad company, on their own behalf, and that of owners of other bonds, to restrain the railroad company from using its net earnings for the purpose of carrying out the terms of a lease executed to it by another railroad company and for an accounting. The court, at pages 145, 146, held that the net earnings of the defendant were payable subject to the discretion of the directors and that, at most, the promise was to pay "dividends", if declared. The clause in the bonds, which the court construed as the grant of discretion to the directors, was as follows, viz.:

"* * * that the board of directors of said company shall determine the amount of such net earnings. * * *"

The clause in the debentures involved in the case at bar is much stronger, to wit:

> "The amounts, if any, payable * * * out of the net earnings * * * will be fixed and declared by the Board of Directors * * * and when so declared, any amount payable hereon will be paid * * *."

In *New York, etc. R. R. Co.* v. *Nickals*, 119 U. S. 296, the clause in the certificate of incorporation which was construed by this Court to give discretion to the directors as to payment of dividends on preferred stock, was as follows:

> "* * * non-cumulative dividends, at the rate of six per cent. per annum * * * dependent on the profits of each particular year, as declared by the board of directors."

This Court held that no dividends were payable until declared by the Board of Directors.

It will be recalled that the similar clause in the Class B Debentures of the Respondent provides:

> "None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors * * *, and when so declared * * * will be paid * * *." (R. 7, 8).

In the opinion of the Court in the above-mentioned case of *New York, etc. R. R. Co.* v. *Nickals*, at page 302, it is stated that the corporation reported a net profit from operations, after deducting operating expenses, interest, rentals of leased lines and other charges. The plaintiff claimed that the use of the fund for any other purpose other than for dividends was a breach of trust on the part of the Company. It was further set forth that the Company did not

deem it wise or expedient to declare a dividend upon its preferred stock and (at page 303) that the earnings were in good faith used for improving the Company's road and other property and further (at page 304), that there is nothing in the language of the preferred stock depriving the directors of their discretion.

The Petitioners on page 15 of their brief assert, in commenting upon the *Nickals* case, as follows:

> "Petitioners do not seek to avoid any expenditures or provisions made by the Company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and to charge expenditures of this character against annual earnings is expressly recognized in Exhibit "B" attached to the complaint, for Petitioners claim only such residual earnings as remain 'after deducting reserves for additions, general improvements and depreciation' (R. 4, 8)."

The provisions of the Class B Debentures either provide for full discretion to the Board of Directors in connection with the payment of distributions or dividends or provide no discretion. The Petitioners by framing their complaint to exclude such amounts cannot thereby affect the terms of the contract. As a matter of fact, their position is inconsistent within their own brief for, on page 4, they assert the right of the directors to use discretion in setting up reserves but on page 5 assert categorically that the holders of Class B Debentures have an absolute and unqualified contractual right to receive any net earnings remaining after payment of the prescribed limited amounts to holders of senior securities.

The Petitioners are in a real dilemma. They do not wish to concede that the directors have full discretion and

yet they have great reluctance in accepting a construction which would deprive the directors of the right to use their judgment in running the Railroad and making necessary appropriations to surplus for provident purposes. They apparently have a natural feeling that any railroad which is required by contract to pay out all of its net earnings to security holders cannot long continue to operate.

The Class B Debentures are a very unusual type of security. Although called "debentures" they are the junior equity security of the Respondent, a position normally occupied by Common Stock. As heretofore stated they are junior not only to the Class A Debentures but also to the so-called Common Stock. In the event of reorganization or sale which is the only maturity date of the Debentures, the holders are entitled to everything remaining after payment of the face amount of the Class A Debentures ($600,000) and the Common Stock ($2,500,000) (R. 7). Therefore, all restrictions on distribution of annual earnings deemed necessary for the best interests of the Railroad operate to the ultimate benefit of the Class B Debentures. The Debentures were originally issued in the year 1896 pursuant to a plan of reorganization of predecessor companies resulting in a foreclosure action (R. 15) in the Federal District Court in Wisconsin. The Class A Debentures are analogous to First Preferred Stock, the Common Stock resembles voting second preferred stock and the Class B Debentures are analogous to non-voting common stock.

The comments of this Court in the *Nickals* case above-mentioned are so apt as to justify rather a lengthy quotation. At page 304, this Court said:

> "There is nothing in the language of either necessarily depriving the directors of the discretion with which managing agents of corporations are usually

invested, when distributing the earnings of property committed to their hands. As was said by the court, in *Clearwater* v. *Meredith*, 1 Wall. 25, 40, 'when any person takes stock in a railroad corporation he has entered into a contract with the company that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized.' The directors of such corporations, having opportunities not ordinarily possessed by others of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent in any particular year to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when, in good faith, believed to be necessary, for the preservation or improvement of the property intrusted to its control. * * *

"* * * but it was not intended to confer upon the former (the preferred stockholders) an absolute right to a dividend in any particular year, dependent alone on the fact, or the official ascertainment of the fact, that there were profits in that year, after paying operating expenses and fixed charges. * * *"

The Petitioners and Judge Frank in his opinion cite the following cases in support of the contention that the directors have no discretion, to wit:

Crocker v. *Waltham Watch Co.*, 315 Mass. 397, 53 N. E. (2d) 230;
Burk v. *Ottawa Gas & Electric Co.*, 87 Kans. 6;
Wood v. *Lary*, 47 Hun 550.

Crocker v. *Waltham Watch Co.* is distinguishable. In that case the court found the language of the Agreement of Association to evidence immediate necessity and to be mandatory not only from the words employed, i. e., "shall forthwith declare and pay to the holders of the common stock, Class A, a dividend * * * provided the Company's capital will not be impaired by such payment." but also in the light of surrounding circumstances of the issuance of the shares to the public for cash. Neither language nor circumstances surrounding the issuance are similar in the case at bar.

The Massachusetts Court seemed to be strongly influenced by the following particular fact, to wit (p. 408):

"(That the shares) were sold to the public as the issue of a company succeeding to the business of a failing concern, in an effort to raise new capital for the business. It seems most likely that new investors

> in a business whose future was certainly speculative could not be induced to risk their money in the new company except upon the assurance that if operations should result in net earnings they, the investors, would definitely receive a share of those earnings. * * *"

No claim is made that the Class B Debentures in the case at bar were paid for in cash at the time they were issued in connection with the reorganization in 1896. As we previously stated, they are a form of non-voting common stock, junior in lien to the Class A Debentures (analagous to First Preferred Stock) and to the Common stock (analagous to Voting Second Preferred Stock). The said opinion also states (p. 402):

> "The cases in this Commonwealth as well as those of other jurisdictions reveal, in general, a reluctance on the part of the courts to construe provisions relative to the declaration of dividends in such a way as to hold that it is mandatory upon the directors in any circumstances to declare dividends."

The *Crocker* case does not appear to have been followed in other jurisdictions.

Burk v. *Ottawa Gas & Electric Co., supra,* is readily distinguishable. The by-law construed provided that, "The preferred stock shall carry a six per cent per annum preferred, non-cumulative dividend * * * out of the net profits." No mention is made of any action to be taken by the directors, as in the case at bar. Furthermore, in discussing the *Burk* case, the Court, in *Crocker* v. *Waltham Watch Co., supra,* said (p. 406):

> "The Court (in the *Burk* case) was aided in reaching that construction (that dividends were manda-

tory) by another by-law which showed that, when dividends were meant to rest in the discretion of the directors, the draftsman knew how to employ appropriate language. That by-law read thus: 'Upon the common stock only such dividends and at such times shall be paid out of the company's net profits as the board of directors may in their judgment deem it advisable to declare.' "

Wood v. Lary, 47 Hun 550 (1888) is also similarly distinguishable.

There are many causes of action against foreign corporations wherein jurisdiction is taken by the courts where the suits are brought. It is settled law, however, that where an action affects the internal management of a foreign corporation, such as seeking to compel the declaration of dividends, courts in jurisdictions other than those in the state of the domicile of the corporation, will not take jurisdiction. The fact that the subject corporation may carry on activities in the State where the action is brought does not affect the rule. The leading cases supporting these principles are:

Rogers v. *Guaranty Trust Company*, 288 U. S. 123;

Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102;

Goldstein v. *Lightner*, 266 App. Div. 357, aff'd. 292 N. Y. 670;

Strassburger v. *Singer Manufacturing Co.*, 263 App. Div. 518;

Miesse v. *Seiberling Rubber Co.*, 264 App. Div. 373;

Nothiger v. *Corroon & Reynolds Corporation*, 266 App. Div. 299, aff'd. 293 N. Y. 682.

In *Rogers* v. *Guaranty Trust Co., supra,* the plaintiff did not seek to compel the payment of distributions from surplus earnings, analogous to dividends, as in the case at bar. Even the dissenting justices in that case were of the opinion that a suit of that nature would involve the internal affairs of the corporation, for Mr. Justice Stone, in his dissenting opinion, concurred in by Mr. Justice Brandeis, said (p. 144):

> "But the case before us is, in this respect, unlike a suit to * * * compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102."

On page 13 of Petitioners' brief, there is a statement to the effect that Justices Stone, Brandeis and Cardozo had dissented in the *Rogers* case and were of opinion that on the facts presented, jurisdiction should have been assumed. In Mr. Justice Stone's dissenting opinion, he stated on page 145, "We are presented with no problem of administration". In this opinion Mr. Justice Brandeis concurred. From an examination of Mr. Justice Cardozo's dissenting opinion, it would appear, although it is not definitely stated, that he felt that there was no problem of internal administration and he went on to say on page 151:

> "The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved."

There is no charge of personal wrongdoing on the part of the Directors in this case as there was in the *Rogers* case.

In the leading case of *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102 (1931), the plaintiff demanded judgment that the defendant, a foreign corporation, either redeem shares of its stock at par value or, in the alternative, declare a dividend out of its surplus. The Court, after stating the principle that jurisdiction will not be taken to regulate the internal affairs of a foreign corporation, said (p. 105):

> "While it is not always easy to say when jurisdiction will be taken and when declined, and while contracts between a foreign corporation and its members will usually be enforced in the courts of this State, it seems clear that the jurisdiction now invoked must be declined under the principle stated."

The basis for the rule of noninterference with the internal affairs of a foreign corporation is set forth in *Overfield* v. *Pennroad Corporation*, 113 Fed. (2d) 6 (C. C. A. 3rd, 1940), wherein the Court said (p. 12):

> "The reason the state court of equity declines to take jurisdiction of a suit involving the internal affairs of a foreign corporation is because the matter will require the exercise of visitorial power."

The Petitioners contend that the fact that they reside in New York City and that some of the Respondent's activities are there makes the Southern District of New York a more convenient place for trial. The opinion in *Rogers* v. *Guaranty Trust Company* in the lower court, reported in 60 Fed. (2d) 114, reveals that the foreign corporation therein involved had its principal office in New York City, where its chief executives were located and where its Board of Directors held its meetings and kept its corporate records and yet jurisdiction in New York was declined.

In *Strassburger* v. *Singer Manufacturing Company, supra,* relied upon in the later case of *Goldstein* v. *Lightner, supra,* affirmed in 292 N. Y. 670, the complaint, included in the case on appeal therein, disclosed that the corporation involved was incorporated in a foreign state, New Jersey, that it had its main offices in New York, that it kept its books and records in New York, that it was managed by its officers and directors in New York and held its stockholders' and directors' meetings there and yet the New York Courts declined jurisdiction.

Judge Caffey, in the Court below, stated, as an additional reason why this case should be tried in Wisconsin, as follows:

> "Moreover, all the physical properties of the defendant (Respondent) which are operated and from which it derives earnings are located in Wisconsin, the State of its incorporation. It is there its main office and principal place of business are situated. There also its chief records are kept." (R. 50)

The principal and general offices of Respondent are situated in Green Bay, Wisconsin, where its President and all of its operating officers reside and have their offices. These officers are the President, the Purchasing Agent, the Assistant-Treasurer, the General Auditor and the Chief Engineer (R. 12). They would be the witnesses who would be called by Respondent to testify in a trial on the merits in this action and in their charge would be the records required to be produced at the trial.

Whether or not the Respondent's directors are amenable to process in Wisconsin is in no wise relevant. They are not made parties to the action.

The Class B Debentures were executed in the State of Wisconsin and specifically so state (R. 8). The fact that a New York Trust Company acted as Trustee to authenticate the Debentures and that, according to requirements of the New York Stock Exchange, transfer agencies for the Debentures and other securities of Respondent are kept within the State of New York, is without importance in the decision of the issues here involved.

Additional reasons which appealed to Judge Caffey in connection with his decision to decline jurisdiction were those stated in his opinion, and emphasized on page 11 of the Petitioners' brief, (1) that the defendant (Respondent) should not be put to the burden and expense of carrying on the litigation so far away as New York from its home state of Wisconsin, and (2) that when avoidable the full calendars of the District Court should not be crowded by a complicated cause of action which could better be tried in the forum of the domicile of the defendant (Respondent) corporation.

However, these are merely reasons additional to the basic reason that the cause of action involved the internal management of a foreign corporation. The charge that Judge Caffey abused his discretion in declining jurisdiction in this case remains totally unsubstantiated.

The principle above stated is not in conflict with Section 224 of the General Corporation Law of New York cited by the Petitioners. That section allows an action against a foreign corporation to be brought by a resident of New York. Without question, the New York Courts are vested with jurisdiction. However, they decline to take jurisdiction in "internal affairs cases" against foreign corporations. *Prouty* v. *Michigan S. & N. Indiana R. R. Co.*, 1

Hun 655 likewise does not conflict. The Court in that case held that it had jurisdiction, supporting the principle laid down in Section 224 aforesaid; the question of declining jurisdiction was neither raised in the said action nor in *Thomas* v. *Greenwood Lake Railway Co.*, 139 N. Y. 163. *Boardman* v. *Lake Shore & Michigan So. Railway Co.*, 84 N. Y. 157, another case cited by the Petitioners, is not relevant; the question of declining jurisdiction was not raised therein, nor was it proper to do so, for the defendant was a domestic corporation.

POINT II.

A trial on the merits of this suit will involve a construction of the contract between the Respondent and its security holders which will affect the interests of the public principally in Wisconsin and Courts of that State are the proper Courts to determine such construction.

This Court, in *New York, etc. Railroad* v. *Nickals*, 119 U. S. 296, seems to have held that contracts with a railroad may be affected by the public interest, stating (p. 306):

> "* * * the duty of the Company (is) to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight * * *."

Williston on Contracts is authority for the statement that "* * * contracts * * * affecting the public interest are to be construed liberally in favor of the public" (section 626).

The same principle seems to have been applied in construing the bond contract in *Thomas* v. *New York & Greenwood Lake Railway Company, supra*, wherein the Court at page 183, said:

> "The application of earnings to rebuilding the road might in many cases constitute necessary repairs. * * * the general improvement of the road to insure its safety (to the public), and to accommodate a growing business, may constitute necessary repairs, and the board of directors, acting in good faith, might so determine, and the contract does not withdraw these matters from the determination of the governing body of the corporation."

Even the Petitioners "expressly recognize * * * the right of the directors to exercise discretion in that respect (to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight) and to charge expenditures of this character against annual earnings * * *" (Br. 15, 16). But the Petitioners fail to put into practice that which they preach. They refuse to permit the directors to exercise that discretion. The Petitioners substitute themselves for the directors, apparently conducting their own private meeting, and arbitrarily allowing a deduction "for reserves * * * additions, general improvements and depreciation", (Br. 4) without consulting the directors.

The Respondent's directors may have decided to retain the surplus earnings as a reserve for the proper development of the railroad. They may have reasoned that the railroad, built at least a half century ago, should be rebuilt to compete with new roads and facilities, and not remain stationary by merely making necessary maintenance re-

pairs. As demonstrated, the Debentures clothe the directors and not the Petitioners with this discretion.

This Court in the case of *New York etc. Railroad* v. *Nickals, supra,* said (p. 306):

> "A different view (depriving the directors of discretion) would lead to results which sound policy would seem to forbid, and which, therefore, it is not to be supposed were contemplated by the parties. For, if preferred stockholders become entitled to dividends upon a mere ascertainment of profits for a particular year, the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight would be subordinate to their right to payment out of the funds remaining on hand after meeting current expenses and fixed charges. * * * We are of opinion that (the) * * * preferred stockholders * * * are not entitled, of right, to dividends, payable out of the net profits accruing in any particular year, unless the directors of the company formally declare, or ought to declare, a dividend payable out of such profits; and whether a dividend should be declared in any year is a matter belonging in the first instance to the directors to determine, with reference to the condition of the company's property and affairs as a whole. * * *"

Continuing at page 310, this Court said:

> "'The mere fact,' the court said (in *Richardson* v. *Vermont & Massachusetts Railroad,* 44 Vt. 613, 622) 'of the corporation having funds in its treasury sufficient in amount to pay the orators, would not be sufficient to show the *ability of the corporation* contemplated in the vote and certificates. That ability must consist of a fund adequate not only for the payment of the claims of the plaintiffs in the

cause, but for the payment of all other stockholders having like claims; and must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad. In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders.'"

POINT III.

The Respondent by a decision of this Court in the instant case should not be precluded from a trial on the merits.

If this Court should not uphold Respondent's contention that the lower court properly exercised its discretion in declining jurisdiction, we then urge that the Court, in its opinion, state that it has not decided whether the Respondent's Board of Directors had discretion to declare a distribution of earnings or dividends on the Debentures and that the parties may at the trial have the opportunity to submit their proof on that issue. The only question arising on this appeal is whether the lower court upon the allegations in the complaint abused its discretion in declining to take jurisdiction of this action. The parties have not submitted proof required for a trial and decision upon the merits of the issue of the legal construction of the Class B Debentures to determine whether or not the Board of Directors is invested with discretion to declare dividends.

The authorities, hereinafter cited, hold that on a construction of a contract, the court may consider all of "the surrounding circumstances * * * when the contract was made." If such reservation is not made by this Court in its opinion, the Respondent will be deprived of a trial of the important issue in this case, without being afforded the opportunity of supplementing the language of the Debentures with proof of the circumstances surrounding the making of the contract, in accordance with the decisions in *Merrigm* v. *United States,* 107 U. S, 437 (1882) and in *Continental Insurance Co.* v. *Minneapolis St. P. & S. S. M. Ry. Co.,* 290 Fed. 87 (8 Circ. 1923 cert. denied 263 U. S.)

In *Merriam* v. *United States, supra,* the Court said at page 441:

> "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. *Nash* v. *Towne,* 5 Wall. 689; *Barreda* v. *Silsbee,* 21 How. 146, 161; * * *."

In *Continental Insurance Co.* v. *Minneapolis St. P. & S. S. M. Ry. Co., supra,* the Court said (p. 91):

> "* * * those terms (in the certificate) are not the only evidence of the contract, and that they must be read in connection with the charter and by-laws in force at the time the stock was issued, to ascertain the true terms of the contract, * * *."

CONCLUSION.

The order and judgment appealed from should be affirmed.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT,
W. LLOYD KITCHEL,
Attorneys for Respondent.

W. LLOYD KITCHEL,
MERRILL M. MANNING,
WALTER BRUCHHAUSEN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 100.—October Term, 1945.

Bertram Williams, Max Brasch and Heinz Mottek, Suing on Behalf of Themselves and All Other Holders of Class B Debentures of Green Bay and Western Railroad Company, Petitioners, *vs.* Green Bay and Western Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 7, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners, residents of the City of New York, are holders of Class B debentures issued by respondent railroad company, a Wisconsin corporation. They brought this suit in the New York courts to recover amounts alleged to be due and payable under the debentures out of earnings in lieu of interest. On petition of respondent the action was removed to the federal District Court for the Southern District of New York on the grounds of diversity. Respondent thereupon moved (1) to set aside the service because respondent was not doing business in New York and (2) to dismiss because the subject matter was concerned with the internal affairs of a foreign corporation. The District Court denied the first motion, but granted the second. 59 F. Supp. 98. On appeal the Circuit Court of Appeals affirmed by a divided vote, holding that the District Court did not abuse its discretion in basing its dismissal on *forum non conveniens*. 147 F. 2d 777. We granted certiorari because of the importance of the question presented.

The Class B debentures, issued in 1896, have no maturity date. Their principal is payable "only in the event of a sale or reorganization" of the company and "then only out of any net proceeds" remaining after specified payments to the Class A debentures and to the stock. The covenant in the Class B debentures out of which

this litigation arises is set forth below.[1] The Circuit Court of Appeals was divided as to its meaning. The majority concluded that even though there were net earnings after the payments to the Class A debentures and to the stock, the directors had discretion to determine whether or not that sum should be paid to the Class B debentures. The court thereupon held, in reliance on *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102; *Cohen* v. *American Glass Window Co.*, 126 F. 2d 111, that the suit concerned the internal affairs of respondent and could better be tried in Wisconsin, the state of its incorporation. The minority thought that the amount of net earnings remaining after deducting the payments made to the Class A debentures and to the stock was to be paid to the Class B debentures, that the directors had no discretion to withhold such amounts, and that their payment involved nothing more than a ministerial act.[2] In that view the suit was substantially the same as one for a liquidated sum and would entail no interference with the internal affairs of a foreign corporation.

---

[1] "The said Railroad Company Hereby Agrees that until such payment, the holders of this Series of Debentures shall in lieu of interest thereon participate in the distribution of annual net income to the following extent, viz.:—So much of the annual net earnings of the said Company in any year as would be applicable to the payment of dividends on stock shall be applied as follows, viz.:—To the holders of Class A Debentures 2½ per cent upon the face value thereof, or if such annual net earnings are insufficient for the payment of the same, then all such net earnings shall be distributed pro rata among the holders of said Class A Debentures. After the payment of 2½ per cent upon the face value of Class A Debentures, the stockholders of the Company are entitled to receive the balance of such net earnings until 2½ per cent shall have been paid out of the same upon the par value of the said stock, and all surplus net earnings then remaining shall be paid to the holders of Class A Debentures and of the stock pro rata until five per cent shall have been paid upon the face value of said Debentures and upon the par of said stock for such year, and any surplus net earnings arising in such year which may then remain shall be paid to and distributed among the holders of class B Debentures pro rata. None of such payments shall be cumulative. The amounts, if any, payable upon this series of debentures out of the net earnings in any year, will be fixed and declared by the Board of Directors on or before the first day of February, in the following year; . . . ."

[2] Petitioners alleged that, with the exception of three years, respondent had substantial net earnings in each year from 1924 to 1943, inclusive, in excess of the amounts required to be paid and actually paid on the Class A debentures and on the stock. The aggregate amount of such net earnings, after deducting reserves for additions and general improvements and depreciation, and after deducting the payments on the Class A debentures and the stock was alleged to be approximately $1,650,000. The amounts actually paid on the Class B debentures during those years was $840,000, leaving due, according to petitioners, about $810,000.

We leave open the question of the proper construction of the "net earnings" covenant in the Class B debentures. Although we assume that the majority of the court below was right in its interpretation of the covenant, we think it was improper to dismiss the case on the grounds of *forum non conveniens*.

Rogers v. *Guaranty Trust Co., supra*, is the only decision of this Court holding that a federal court should decline to hear a case because it concerns the internal affairs of a corporation foreign to the State where the federal court sits. A corporation chartered by one State commonly does business in the farthest reaches of the nation. Its business engagements—the issuance of securities, mortgaging of assets, contractual undertakings—frequently raise questions concerning the construction of its charter, by-laws and the like, or the scope of authority of its officers or directors, or the responsibility of one group in the corporate family to another group. All such questions involve in a sense the internal affairs of a corporation—whether in a suit on a contract the corporation interposes the defense of *ultra vires*, or a bondholder sues on his bond or a stockholder asserts rights under his stock certificate. But a federal court which undertakes to decide such a question does not trespass on a forbidden domain. See *Williamson* v. *Missouri-Kansas Pipe Line Co.*, 56 F. 2d 503, 510. Under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, a federal court in a diversity case applies local law. In conflict of laws cases that may mean ascertaining and applying the law of a State other than that in which the federal court is located. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. The fact that the corporation law of another State is involved does not set the case apart for special treatment. The problem of ascertaining the state law may often be difficult. But that is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it. As we said in *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, "The diversity judisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts." So long as diversity jurisdiction remains, the parties may not be remitted to a state court merely because of the difficulty of making a decision in the federal court. *Meredith* v. *Winter Haven, supra*. If the District Court were sustained

in declining to exercise its jurisdiction in this case, there could be no assurance that the litigation would be transferred to the Wisconsin state courts. If petitioner sued in the federal court in Wisconsin, as they could by reason of diversity of citizenship, no reason is apparent why that court should not proceed to decision. The fact that the federal court in Wisconsin could pass on this internal affair of this corporation does not, of course, mean that the federal court in New York need do so. The nature of the problem presented and the relief sought might be of controlling significance in inducing the federal court in New York to remit the parties to Wisconsin. But as we shall see, no special circumstances of that nature are present here.

We mention this phase of the matter to put the rule of *forum non conveniens* in proper perspective. It was designed as an "instrument of justice".[3] Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive.[4] An adventitious circumstance might land a case in one court when in fairness it should be tried in

[3] Mr. Justice Cardozo dissenting, Rogers *v.* Guaranty Trust Co., *supra*, p. 151.

[4] In Gibb, International Law of Jurisdiction (1926), pp. 212-213, the law of England and Scotland is stated as follows: "the court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* of success in putting forward a defence of *forum non conveniens*. For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent."

In Societe du Gaz de Paris *v.* "Les Armateurs Francais", 1926 S. C. (H. L.) 13, perhaps the leading English case on the subject, a French manufacturing company sued a firm of French shipowners in a Scottish court on a charter-party. It provided that the vessel was to load a cargo of coal in England and proceed to a French port. The vessel, after loading, sailed and foundered. The plaintiff attached another vessel of defendants' found in a Scottish port and claimed damages by reason of the unseaworthiness of the vessel. Neither plaintiff nor defendant had a place of business in Scotland. The bulk of the evidence necessary to determine the controversy was French, no machinery existed for compelling the attendance of French witnesses in a Scottish court, no question of Scots law was involved, and a trial in Scotland would deprive defendants of a defense open under French law. A judgment sustaining the plea of *forum non conveniens* was sustained. Lord Chancellor Cave summarized the rule as follows: " . . . if in any case it appeared to the Court, after giving consideration to the interests of both parties and to the requirements of justice, that the case could not be suitably tried in the Court in which it was instituted, and full justice could not be done there to the parties, but could be done in another Court, then the former Court might give effect to the plea by declining jurisdiction and permitting the issues to be fought out in the more appropriate Court." pp. 16-17. Lord Shaw of Dunfermline

another. The relief sought against a foreign corporation may be so extensive or call for such detailed and continuing supervision that the matter could be more efficiently handled nearer home.[5] The limited territorial jurisdiction of the federal court[6] might indeed make it difficult for it to make its decree effective.[7] But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it.[8] The

---

stated: "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a *forum* which is not the natural or proper *forum*, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the *locus contractus*, or the *locus solutionis*, then the doctrine of *forum non conveniens* is properly applied." p. 20.

And see Canada Malting Co. *v.* Paterson Steamships, 285 U. S. 413, 423, where Mr. Justice Brandeis speaking for the Court said, "Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." For reviews of the cases see Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Col. L. Rev. 1; Foster, Place of Trial in Civil Actions, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41; Dainow, The Inappropriate Forum, 29 Ill. L. Rev. 867.

[5] See Wallace *v.* Motor Products Corp., 25 F. 2d 655, where a suit was brought in the federal court in Michigan to annul the reorganization of a New York corporation and to restore the stockholders of the old corporation to the position they had occupied prior to the reincorporation; Eberhard *v.* Northwestern Mut. Life Ins. Co., 210 Fed. 520, where policy holders of a Wisconsin life insurance company sued in the federal court in Ohio for an accounting of dividends received and paid and for an injunction against the election of trustees, and praying that the trustees who had committed allegedly wrongful acts be decreed not to be officers of the company and that a receiver of the company be appointed; Boyer *v.* Travelers' Protective Ass'n, 75 F. 2d 440, where suit was brought in the federal court in Pennsylvania to enjoin a Missouri corporation from enforcing certain amendments to its constitution; Cohen *v.* American Window Glass Co., 126 F. 2d 111, where stockholders of a Pennsylvania corporation sued in the federal court in New York to enjoin a proposed merger, to have declared illegal the payment of dividends, and to have a receiver, resident in Pennsylvania, appointed.

[6] Georgia *v.* Pennsylvania R. Co., 324 U. S. 439, 467-468, and cases cited.

[7] The same is true, of course, of state courts. See Taylor *v.* Mutual Reserve F. L. Ass'n, 97 Va. 60; Howell *v.* Chicago & N. Ry. Co., 51 Barb. 378, 383. Cf. also the cases where the court in which suit is brought cannot give the relief necessary to produce an equitable result (Marshall *v.* Sherman, 148 N. Y. 9; State *v.* Denton, 229 Mo. 187) or where the right of recovery is incapable of enforcement because it is so dissimilar to any which the court, whose jurisdiction is invoked, recognizes. Slater *v.* Mexican National R. R. Co., 194 U. S. 120.

[8] American Seating Co. *v.* Bullard, 290 Fed. 896, 901, where stockholders of a New Jersey corporation, who did not consent to the sale of its assets pursuant to a plan of reorganization and refinancing, sued in the federal court in Michigan to recover the value of their stock; United Milk Products

same may be true even where an injunction is sought.[9] We give these merely as illustrations. Each case turns on its facts. There are no special circumstances here, however, which should lead the District Court in New York to decline to exercise the jurisdiction which it has.

If petitioners' theory of the case is right, the court need go no further than it would in enforcing any contract to pay money. If, as the majority of the court below thought, the payment of net income to the Class B debentures rested in the discretion of the directors, the question under the applicable local law would normally be whether their discretion had been abused.[10] In case it were found to have been abused, the customary remedy is comparable to that which a court of equity affords in a suit for specific performance.[11] The point is that, however this suit be viewed, the relief sought is not of such a character as to suggest that the federal court in New York would be so handicapped that it should remit the parties to Wisconsin. There is a suggestion that the parties should be remitted to Wisconsin because a construction of the covenant will primarily affect the interests of the public in that State where all of respondent's railroad lines are located. Reference is made to *New York, Lake Erie & W. R. R. Co.* v. *Nickals*, 119 U. S. 296, where preferred stockholders sued for dividends which they claimed had been earned on their stock and wrongfully

Corp. *v.* Lovell, 75 F. 2d 923 (semble); National Lock Co. *v.* Hogland, 101 F. 2d 576 (semble); Overfield *v.* Pennroad Corp., 113 F. 2d 6, where stockholders brought a derivative action in the federal court in Pennsylvania to recover for wrongs done their company, a Delaware corporation, by a Pennsylvania company; Williamson *v.* Missouri-Kansas Pipe Line Co., *supra*, (semble). Cf. Kelley *v.* American Sugar Refining Co., 139 F. 2d 76.

[9] Harr *v.* Pioneer Mechanical Corp., 65 F. 2d 332, where stockholders of a Delaware corporation sued in the federal court in New York to enjoin the sale of stock on the representation that it had priority over the shares held by plaintiffs; American Creosote Works *v.* Powell, 298 Fed. 417, where stockholders of a Maryland corporation sued in the federal court in Louisiana to annul and cancel the issuance of certain stock.

[10] That is the usual rule in suits to compel the declaration of dividends. Dodge *v.* Ford Motor Co., 204 Mich. 459; Morey *v.* Fish Bros. Wagon Co., 108 Wis. 520, 529; Hiscock *v.* Lacy, 9 Misc. 578; Kassel *v.* Empire Tinware Co., 178 App. Div. 176.

See Spellman, Corporate Directors (1931) § 141; Weiner, Theory of Anglo-American Dividend Law, 29 Col. L. Rev. 461; Ballantine & Hills, Corporate Capital and Restrictions Upon Dividends Under Modern Corporation Laws, 23 Calif. L. Rev. 229.

[11] For the decree entered in Dodge *v.* Ford Motor Co., *supra* note 9, see Kales *v.* Woodworth, 20 F. 2d 395, 396. And see Boardman *v.* Lake Shore & M. S. Ry. Co., 84 N. Y. 157, 180; Kassel *v.* Empire Tinware Co., *supra* note 10, p. 180.

withheld. The Court construed the particular contract as vesting discretion in the directors. In holding that their discretion in withholding a distribution of net earnings had not been abused, it emphasized "the duty of the company to maintain its track and cars in such condition as to accommodate the public and provide for the safe transportation of passengers and freight." p. 396. But such considerations will frequently be involved in applying the rule of *Erie R. Co.* v. *Tompkins, supra.* They go no further than to suggest one additional phase of local law which the federal court, whether it sits in New York or in Wisconsin, may have to apply. They fall far short of those instances, reviewed in *Meredith* v. *Winter Haven, supra,* p. 235, where the federal court declines to act because its action might interfere with state proceedings, or state functions, or the functioning of state administrative agencies.

It was held in *Weiss* v. *Routh,* 149 F. 2d 193, that a federal court in a diversity case was required by *Erie R. Co.* v. *Tompkins, supra,* to apply the local rule of *forum non conveniens.* We reserve decision on that question. For even if we assume the New York rule to be applicable here, we would reach no different result. *Cohn* v. *Mishkoff Costello Co., supra,* on which the court below relied was a suit against a foreign corporation for the redemption of its shares of stock or in the alternative for a declaration of a dividend. But that involved a degree of visitation not present here where petitioners seek only a money judgment on their debentures. Nor do petitioners challenge an act of the corporation which "offended solely against the majesty of the State to which it owed its life." *Ernst* v. *Rutherford & B. S. Gas Co.,* 38 App. Div. 388, 392. The Court of Appeals in the *Cohn* case stated that "contracts between a foreign corporation and its members will usually be enforced in the courts of this State." 256 N. Y. p. 105. Cardozo, J., stated the New York rule in *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259, 264, as follows: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of

the corporation as the appropriate tribunals." And see the New York authorities reviewed in *Weiss* v. *Routh, supra.* In the *Travis* case the court entertained a suit by a stockholder of a foreign corporation to compel the transfer of shares or to recover their value. We perceive in the present case no greater interference in the internal affairs of this foreign corporation.

Nor can we conclude that the maintenance of this suit in New York will be vexatious or oppressive. Petitioners, as we have said, reside there. While respondent's railroad lines are wholly in Wisconsin, it does business in New York. The Class B debentures are listed and traded in on the New York Stock Exchange. The amounts payable on them in lieu of interest are payable in New York. Respondent maintains its financial as well as a traffic office in New York. It maintains a bank account in New York, not only to take care of obligations under its securities, but also to handle excess operating funds not needed in Wisconsin. Five of respondent's six directors are to be found in New York. These five directors include all the executive and fiscal officers, except the president who supervises operations in Wisconsin and the general auditor who is in Wisconsin. Directors' meetings are customarily held in New York. Two of the three members of the executive committee, which acts for the board between meetings, are to be found in New York. Financial records, transfer books, minute books and the like are kept in New York. These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered. We accordingly conclude that, the requirements of jurisdiction and venue being satisfied (Judicial Code, §§ 24, 51, 28 U. S. C. §§ 41(1), 112), the District Court should not have declined to hear and decide the case.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.